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Supreme Court of the United States

October Term, 1973.

No. 72 - 1050

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND)
Owner of the Motor Vessel GERWI

and

BERGENSSKIBSASSURANSEFORENING,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD W. PALMER,
RAUL BETANCOURT, JR.,
RAWLE & HENDERSON,
2100 Packard Building,
Philadelphia, Pa. 19102,
Counsel for Petitioners.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	7
I. Conflict With the Fundamental Principles Established by This Court in *Indian Towing Co. v. U. S.*, 350 U. S. 61 (1955) Which Determined the Basis for Liability of the United States for Failure to Perform Its Statutory Duties and Assumed Obligations	7
II. Conflict With the Principles Established by This Court in the *China*, 7 Wall 53, 58 (1868), and *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406, 416-417 (1901)	18
III. Conflict With Decisions of the Courts of Appeal for the Second and Fourth Circuits	18
A. Second Circuit	19
B. Fourth Circuit	21
IV. The Writ Should Be Granted Because of the Extraordinary Adverse Effect of the Gerwi Decision on the Safety of Navigation and the Preservation of Our Ecology in Navigable Waterways Managed by the United States	22
A. Conflict With Intent of Congress as to U. S. Army Corps of Engineers	24
B. Conflict With Intent of Congress as to U. S. Coast & Geodetic Survey (Nautical Chart Division)	25
C. Conflict With Intent of Congress as to U. S. Coast Guard	25
CONCLUSION	27
APPENDIX:	
District Court Opinion	A1
Court of Appeals Opinion	A25
Court of Appeals Opinion on Resubmission	A41
Court of Appeals Order Denying Petition for Rehearing	A47-1
Exhibit L-7	A48

TABLE OF CASES CITED.

	Page
Afran Transport Company, Owner of Steamship Northern Gulf v. United States of America, 309 F. Supp. 650 (S. D. N. Y. 1969), affirmed 435 F. 2d 213 (2 Cir. 1970), cert. den. 404 U. S. 872	19
China, 7 Wall 53 (1868)	18
Everitt v. U. S., 204 F. Supp. 20 (S. D. Tex. 1962)	24
Homer Ramsdell Transportation Co. v. La Campagnie Generale Transatlantique, 182 U. S. 406 (1901)	18
Indian Towing Co. v. United States, 350 U. S. 61 (1955)	7, 10, 16
McAllister v. United States, 348 U. S. 19 (1954)	11
Pioneer Steamship Co. v. U. S., 176 F. Supp. 140 (E. D. Wis. 1959)	24
Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951), reversing and remanding 95 F. Supp. 298	21
U. S. v. Republic Steel Corp., 362 U. S. 482 (1960)	9, 24
U. S. v. Chicago M. St. P. & P. R. Co., 312 U. S. 592 (1941)	9, 24

MISCELLANEOUS.

	Page
Restatement (Second) of Torts, Section 311 (1965)	11
Report of District Engineer, Philadelphia, January 13, 1963, pages 11, 17, paragraph 22, House Document No. 358, 83rd Congress, Second Session	25
33 CFR 209.120(a) and (e), 209.170, 209.200(a) and (b), and (g)	24
28 USC 1254(1)	1
33 USC, Section 401, 403, 409, 413	24
33 USC, Section 540, 541, 542, 557(a) and (b) and 562	24
33 USC, 858	25
33 USC 883a	25
Federal Water Pollution Act, Public Law 92-500, 92nd Congress, S.2770, 41 Law Week 79	27

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners, Kommanvittselskapet Harwi (Rolf Wigand), Owner of the Motor Vessel GERWI, and Bergens Skibsassuranseforening, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit after rehearing dated September 26, 1972, reversing a prior opinion dated September 29, 1971.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 305 F. Supp. 882 (E. D. Pa. 1969), and unofficially reported in 1970 AMC 482. This decision is printed *Infra*, p. A1.

The first majority opinion of the Court of Appeals for the Third Circuit reversing the District Court is unofficially reported in 1971 AMC 2435 and printed *Infra*, p. A25. The second majority decision of the Court of Appeals for the Third Circuit following re-submission (without oral argument) ordered in response to the Government's Petition for Rehearing, reversed the first majority opinion of the Third Circuit and affirmed the District Court. The second majority opinion is reported at 467 F. 2d 456 (1972), and is printed *Infra*, p. A41.

Appellants' Petition for Rehearing *en banc* was denied on November 2, 1972.

A certified record is being transferred from the Court of Appeals of the Third Circuit to the Supreme Court at or about the time of the filing of this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 26, 1972. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED.

Is the safety of maritime navigation on navigable waters of the United States, managed by the U. S. Army Corps of Engineers, of such prime importance to the public at large in order to avoid maritime ecological disasters, including oil pollution, that the Government should be made responsible for reasonable care in the performance of its assumed duties, including preparation and dissemination of charts and other navigation documents, so that the burden of such responsibilities is not shifted to private individuals by exonerating the United States from the dangerous consequences of false, misleading and negligent publications?

STATEMENT OF FACTS.

On May 23, 1963, the GERWI, a Norwegian bulk ore carrier, 562 feet in length with a 72-foot beam and draft of 27 feet, 11 inches, foreward and aft, commenced her transit from Philadelphia to the United States Steel Company plant at Morrisville, Pennsylvania. The vessel followed the "existing" channel ranges which were marked with range lights and buoys jointly established by the Corps of Engineers and by the Coast Guard. These aids to navigation were currently being maintained by the Coast Guard and were serviced by the Coast Guard buoy tenders LILAC and ZINNIA whose commanding officers testified at the trial that the range lights and buoys in the "existing" Torresdale Range channel were in their charted positions shown on the current U. S. Coast & Geodetic Survey Chart No. 296 as of May 23, 1963 (L-7, *infra*, p. A48; 373a) and that the "project" channel under construction for the realignment and deepening of a new channel range was not marked by range lights or buoys.

The vessel's navigation was in the charge of a compulsory[1] pilot licensed by the State of Pennsylvania to pilot ships of foreign registry up the Delaware (F/F No. 7, 350a).

The District Court correctly found that the pilot, in order to navigate the vessel, was relying partly on the U. S. Navigation Chart (L-7), partly on his copy of the latest Engineer's Channel Depth Statement dated May 3, 1963 and partly on his experience to determine current minimum depths in the river channel (F/F No. 27, 354a; L-9, 376a).

The Court also correctly found that the U. S. Corps of Engineers made it a practice to publish and mail channel depth statements to all pilots, and that the Channel Depth Statement of May 3, 1963 (L-9, 376a) was such a statement (F/F 23, 353a; Caccese 301-302a).

The statement showed a minimum depth of 29 feet, 9 inches, which furnished 33 feet, 9 inches of water in the existing Torresdale Range with a 4 foot flood tide (F/F Nos. 9, 12, app. 350a; Lappe 103a, 58-59). This depth permitted the vessel to navigate in the "existing" Range while drawing 27 feet 11 inches (F/F No. 9, 350a; F/F No. 27, 355a). But, unknown to the pilots as well as the Coast Guard officers serving on the river, the depths in the statement did not relate to the "existing" channel marked by the range lights as shown on Chart L-7 (Lappe 126-127a, 129-131a; Ives 326a; Olson dep. 29-32a; Hanson dep. 50-51a; Garrett dep. 59-61a; Patrick dep. 70-71a). The vessel proceeded up river in fair sunny weather with a very light 5-6 knot wind on a rising tide. Visibility was excellent.

To announce the GERWI's arrival to a dredge flotilla working in Torresdale "project" and to obtain permission to pass the dredge in the "existing" channel, the pilot attempted without success to establish radio contact with the

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1. The vessel owner is not personally responsible for the negligence of a "compulsory" pilot. (See Point II, p. 18.)

dredge and drill (F/F Nos. 14-15, 351a). Thereafter, and before the GERWI entered Torresdale Range, U. S. Coast Guard buoy tender ZINNIA responded by radio to the GERWI instructing the pilot to pass the flotilla on the Pennsylvania side in the left half of the "existing" channel marked by range lights, but outside of the "project" channel under construction (F/F No. 15, 351a; Lappe 45a).

The pilot stopped the vessel's engines to turn into Torresdale Range and then shaped up on the range in the left half of the channel, with the dredge and drill occupying the New Jersey half of the existing channel (F/F No. 16, Lappe 46-48; 108a; Watson 315a; F/F Nos. 17, 19, 351a). The GERWI's starboard side was lined up on the range lights marking the "existing" channel center line (F/F No. 17, 351a).

As the GERWI proceeded on dead slow ahead, she struck rock and tore out several of her bottom plates on her port side (F/F Nos. 17, 19, 351a; L-7; 373a).

The District Court correctly found that the GERWI, at the time of grounding, was within the "existing" channel limits of Torresdale Range as marked by range lights and buoys and outlined on the current navigation chart (L-7; 373a). However, the decision of the District Court depends on the implicit but unsupported assumption that the GERWI should have been navigating in the "project" channel (305 F. Supp. 892, 894).

The Corps of Engineers admitted at the trial that the portion of the "existing" channel where the GERWI grounded had not been maintained by surveying or dredging and that the actual depths had not been published for the "existing" channel since 1957, notwithstanding the Coast Guard's continued operation of range lights and buoys on that channel, and notwithstanding the Engineers' continued publication of depths from time to time for use by mariners concerning other channel ranges in the upper

river (F/F Nos. 23 and 35, 352-353a, 357a; Opinion 14-15; Caccese 285a; Cable 343-344a; Griffin 250-252a, 271a; Olson dep. 29a, 35-37a, 42a; Patrick 63-64a, 69a, 74a; Hanson 52-55a; Garrett 59-61a; L-9-15, 65; 376-386a, 417a).

Commander H. F. Olson, assistant chief of the Aids to Navigation Section, Third U. S. Coast Guard District of New York (which includes the Delaware River) and other Coast Guard officers testified in response to appellants' subpoenas, as did the river pilots, that depths shown in the five columns on the right side of the Engineers' May 3 statement would be useless if those depths were not for the actual portion (centers, middles, halves and quarters) of the "existing" Torresdale Channel Range physically ascertainable by a navigator by reference to range lights marking the same segments of the "existing" channel ranges (Lappe 78-79a, 88-89a, 97a, 100-101a, 131a; Ives 326a; Patrick dep. 65-66a, 68-69a, 70-71a; Olson dep. 29-32a, 40a, 43-44a and 46-47a; Garrett dep. 57-58a; Hanson dep. 48-49a, 52-54a).

Wallace Bruder, the acting Chief of the Nautical Chart Division of the U. S. Coast and Geodetic Survey at Washington, who was in charge of the preparation of the current navigation chart (L-7; 373a) in use by the river pilots on May 23, 1963 testified that he understood that the channel depths shown on the five columns of the inset on that chart were depths for the corresponding portions of the "existing" channel physically marked by range lights (Bruder dep. 15-18a).

River pilots, including the GERWI's pilot, and the Commanders of Coast Guard buoy tenders which were charged with maintaining channel aids to navigation, i.e. range lights and buoys, stated that they had no reason to expect that the Channel Depth Statements related to any part of the river bed other than the "existing" channel marked by range lights (Lappe 78-79a, 100-101a; Olson dep. 29-32a;

61-62a; Hanson dep. 52-54a; Patrick dep. 70-71a; Garrett dep. 60-61a).

Each of the Coast Guard officers and the GERWI's pilot testified that a navigator who took his vessel into the unmarked "project" channel (assuming the dredge flotilla were not occupying the "project") and outside the limits of the "existing" channel officially marked by range lights and buoys, would be acting at his peril (Olson dep. 40a, 46-47a; Hanson dep. 48-49a; Garrett dep. 58a; Lappe 79a; 131a).

The testimony is uncontradicted that the pilot was guiding his ship through a range lighted channel marked by the United States for which sufficient depths were presumably being reported by the government.

The Third Circuit has affirmed a "serious mistake" on the entire evidence in following the District Court's misguided and uninformed view which was substituted for the uncontradicted evidence of the government experts.

This mistake in resolving the differences between the Army Corps of Engineers on the one hand and the Nautical Chart Division of the U. S. Coast and Geodetic Survey and the U. S. Coast Guard on the other hand has resulted in a serious conflict of principles between the Supreme Court and at least two other Circuit Courts.

REASONS FOR GRANTING THE WRIT.

1. Conflict With the Fundamental Principles Established by This Court in *Indian Towing Co. v. U. S.*, 350 U. S. 61 (1955) Which Determined the Basis for Liability of the United States for Failure to Perform Its Statutory Duties and Assumed Obligations.

The second Gerwi decision of the United States Court of Appeals for the Third Circuit after rehearing, exonerating the United States, has placed on private users of U. S. navigable waters, including pilots and masters, the burden of verification and investigation of navigation information published by the United States even when not subject to any suspicion and has relieved the United States of any responsibility for publication of false, misleading, inaccurate and incomplete navigation charts and depth information.

This precedent is contrary to *Indian Towing Co. v. United States,* 350 U. S. 61 (1955). In that case, the Supreme Court confirmed the principle that the Government is liable for negligence in failing to operate a navigation light which it had established, stating:

> "The Coast Guard need not undertake the light house service. But once it exercised its discretion to operate a light * * * and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to *discover* (emphasis added) this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable * * *." (p. 69)

In that case, the Government ultimately escaped liability because of the pilot's negligence in stranding the vessel outside the channel. In the GERWI, it was conceded there was no negligent navigation.

The Third Circuit, twice changing its views (each with a two to one majority), affirmed the District Court's dismissal of the GERWI's claim for grounding damage by holding that the vessel's pilot should not have relied on the May 3, 1963 Channel Depth Statement (L-9) published by the Army Corps of Engineers to show depths of the "existing" channel range dredged by the Army Engineers. It also implicitly held that the pilot should not have relied on the U. S. Coast & Geodetic Survey navigation chart (L-7), nor should he have relied on the range lights and buoys (established by the Army Corps of Engineers and the U. S. Coast Guard) for the location of the "existing" navigable channel. 305 F. Supp. 882 at 893.

Notwithstanding the District Court's holding that these documents were ~~held~~ not "ambiguous", the Third Circuit ruled in effect that the pilot should have undertaken an independent inquiry of the channel alignment and depths even in the absence of any notice or suspicion that the depths might not relate to the "existing" channel marked by range lights and buoys (Second Opinion, *infra* pp. A44-A45; F/F 29, 305 F. Supp. at 887 and 893). The Third Circuit has in effect directed that the pilot should have made the futile gesture of referring to Army Engineers' blueprint R-1 [2] which shows on its face (though erroneously) that there were adequate depths for the GERWI in the

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2. Admittedly published for navigators to use in checking channel depths but not for identifying channel limits or the actual center line of the channel range marked by range lights, since such blueprints do not show the range lights on the blueprint as physically located on the river to mark the center of the channel range.

"existing" Range (R-1; App. 418a, Griffin 405-407, App. 267-269a). The Government proved no other document or source of information for the channel depths or for "existing" channel alignment (other than the established range lights and buoys shown on U. S. Coast & Geodetic Survey navigation charts such as L-7).

It is shocking that Army Corps of Engineers admitted that it had abandoned without notice to the public the depth maintenance and publishing of depths for the "existing" Torresdale Range channel which was marked by Government range lights and buoys (District Court Opinion, 362a). The Government made no effort to prove that this information, or any notice of it, could have been obtained from any source.

The Gerwi's complaint is that had the Government performed its services properly, with full disclosure, the Corps of Engineers would not only have discovered the shoal in the channel it was inviting navigators to use, but it would have published the existence of the shoal and would have notified the public that the "existing" channel marked by range lights could not be used for vessels exceeding certain depths. Had maintenance been continued and not abandoned for the six year period prior to the May, 1963 grounding, the accident would not have occurred.

It is contrary to the public interest and the long established Congressional policy of the paramount rights of navigation to permit exoneration of the United States for failure to discharge the duties it has assumed in the management of the Delaware and other navigable rivers and harbors to protect the "navigable capacity" and "navigability." *U. S. v. Republic Steel Corp.*, 362 U. S. 482, 485, 487 (1960); *U. S. v. Chicago M. St. P. & P. R. Co.*, 312 U. S. 592, 596 (1941).

In the *Indian Towing* case, *supra*, this Court stated:

> "It is horn book tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'Good Samaritan' task in a careful manner." (p. 64)

In effect, the Second Gerwi decision of the Third Circuit gives the United States license to publish with impunity misleading and inaccurate depth statements which are inconsistent with the channels shown on navigation charts, such statements showing neither ambiguity in themselves nor revealing any inconsistency with the charts. This decision, if allowed to stand, would require navigators to undertake futile independent inquiry which in the case of Gerwi could not have determined that the Engineers' depth information was misleading or inaccurate. On the contrary, any inquiry of known documents would have merely confirmed the misleading information.

The first majority opinion of the Third Circuit Appeals prior to rehearing correctly held:

> "The government's argument is that it never had a duty (statutory or otherwise), to survey or maintain the Torresdale Range, even though it had marked it with range lights and buoys. We find the Trial Court's acceptance of this position to be clearly erroneous." (*Infra*, p. A31)

The Third Circuit also held:

> "In the present case, the Government had published precise surveyed depths for the existing Torresdale Range until January 23, 1957. Suddenly, with no change in chart format, figures were inserted giving the depths in the 'project channel' which was started at that time. The chart dated November 12, 1957, and all charts thereafter, gave depths for the 'Torresdale

Range' which actually were measured in the unmarked, uncompleted project. The Government's 'reason' for giving up maintenance and surveying operations in the marked channel was merely that a new channel was being dug. Certainly, no reasonable navigator would anticipate such irresponsibility on the part of the Government, and the abandonment of the existing channel with no notice to navigators was clearly negligent."

In discussing the negligence of the United States, the majority of the Third Circuit prior to rehearing concluded:

"The principal negligent act was the publishing of false and misleading information which was calculated to induce reliance and did, in fact, induce reliance on the part of the navigator of this vessel. Under these circumstances, the plaintiffs satisfied their burden merely by showing that the information was wrong and that as a result of relying on this wrong information, that damage occurred."[10] (*Infra*, p. A33)

10. This principle has been enunciated in the Restatement (Second) of Torts, Section 311 (1965), as follows: "One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information where harm results to the other * * *"

In discussing the question of reliance, the majority of the Third Circuit before rehearing, held:

"After carefully studying the record before us, we have concluded that the Trial Court's decision is clearly erroneous."[5] 348 U. S. at 20. (*Infra*, p. A28)

5. See *McAllister v. United States*, 348 U. S. 19 (1954) as to the scope of review of a judgment of a trial court, sitting without a jury in admiralty, in a negligence action: "A finding is clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Circuit Court also discussed in detail the reasonableness of the navigator's reliance on the depth statement of May 3, his interpretation of it, and the reasonableness of his interpretation of the charts.

In clear and unequivocable language, the Court of Appeals before rehearing discussed the uncontradicted evidence of government navigators, and perceptively stated:

> "Every professional navigator who testified in the case agreed that any reasonable navigator reading the depth statement of May 3rd would have concluded that the figures appearing therein under the heading 'Torresdale Range' referred to the depths in the channel which was marked by range lights and buoys, on which the navigator was expected to rely in navigating the river. Even the Chief of the Nautical Chart Division of the U. S. Coast and Geodetic Survey at Washington, who was in charge of the preparation of the current navigation chart in use by the river pilot on May 23, 1963[6] testified that he understood that the channel depths shown on that chart were depths for the existing channel physically marked by range lights and buoys. Hence the trial court's finding that the navigator should have interpreted the chart as amended by the depth statement of May 3rd, as referring to the depths in the unmarked, uncompleted channel is not supported by any evidence."[7]

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6. The chart referred to, Exhibit L-7, was used to illustrate the coast geodetic chart in use at the time of the accident. Actually, it was issued on May 25, 1963, which was two days after the grounding. Apparently, the original exhibits were lost, and L-7 was agreed to be a fair representation of the chart which the pilot had with him on the day of the accident. This exhibit, showing depths supplied by the Corps of Engineers for the Torresdale Range, presents the same interpretive problem involved in the May 23, 1963 Corps of Enigneers' chart described above.

7. See Discussion, 305 F. Supp. 882, 892-93.

In discussing the channel through which the navigator was reasonably entitled to navigate his vessel, the Third Circuit before rehearing further held:

> "Since there was only one marked channel through which the GERWI could safely have been navigated, it is perfectly clear that a pilot would believe that the depths given for the 'Torresdale Range' referred to that channel. The trial court's finding that a range is not necessarily marked was clearly erroneous. A 'range' in the navigational sense is defined as 'a pair of lights or daybeacons used to mark a line of definite bearing.' J. Hoel, *Naval Terms Dictionary,* (2nd ed. 1966). Similarly a 'range' is 'a direction indicated by two objects in line, as leading lights of a channel.' W. A. McEwen and A. H. Lewis, *Encyclopedia of Nautical Knowledge* (1953). The Corps of Engineers itself has prepared a *Glossary of Mapping, Charting and Geodetic Terms* (2nd ed. 1969) in which a 'range' is defined as 'the well-defined lines or courses whose positions are known and are used in determining soundings in a hydrographic survey,' and a 'range signal' is 'a buoy, rod, flag or other similar object used to mark and identify range points when taking soundings during a hydrographic survey.' Every expert navigator agreed that unless the depths given for a 'range' referred to the range as marked on the navigational chart, the information as to depths would be entirely useless for navigational purposes because the pilot would have no way of knowing precisely where the stated depths were to be found." (*Infra,* pp. A29-A30)

The pilot's interpretation of the charts in the depth statement was closely analyzed by the Third Circuit before rehearing; the Court's decision gives every indication that it had carefully studied this record, holding:

"A close examination of the charts themselves supports the reasonableness of this interpretation. The data for the 'Torresdale Range' consists of nine columns. The first shows the 'date of survey' as of November 7, 1962. Only the next three columns are headed 'PROJECT' giving the width (400'), length (1.39 miles) and depth (40') of the proposed channel. The remaining five columns give the 'minimum depths in the channel entering from seaward' at various points in the range. There is no indication that these depths are in the 'project' and all the professional navigators agreed there was nothing appearing on the depth statement to indicate that the depths given were for a channel other than the one marked with range marks and buoys. Hence, on the day of the grounding, the GERWI's navigator, relying upon the accuracy of the charts and depth statements published by the United States Government did reasonably conclude that the minimum depth in the Torresdale Range would be 29 feet 9 inches. He would also reasonably believe that the Corps of Engineers were regularly surveying and maintaining that channel, particularly since it was the only marked channel for ocean-going vessels in this area of the river which is heavily trafficked by large ore vessels such as the GERWI bringing ore to the Fairless plant of the United States Steel Company. The evidence is clear, however, that the Corps of Engineers had virtually abandoned the marked channel so that no depth maintenance had been performed since 1955, and that it had not been surveyed since 1957, except where it overlapped with the 'project.'"[8] (footnote omitted) (*Infra*, pp. A30-A31)

The astounding features of this case were thus carefully outlined by the Third Circuit in its first opinion which

was based on the District Court's Findings of uncontradicted facts. The Third Circuit criticized the impossible situation in which the navigator of the GERWI was placed by the trial court. As a navigator he had no alternative but to use the range-lighted channel as marked on the charts, but the trial court effectively ruled that he must navigate in the uncompleted "project" not marked by range lights. The Court found the following facts to be undisputed.

> "After the grounding, it became known for the first time that the Corps of Engineers had stopped surveying the 'Torresdale Range' as plotted on the Coast and Geodetic charts in 1957 and that no depth maintenance was performed after 1955. No notice to mariners to this effect was given and no explanation was offered as to why mariners were not notified that the charted range was no longer being surveyed and maintained. Further, the Corps of Engineers continued to publish depth statements with respect to the depths in all of the ranges on the Delaware River. These statements purported to show the actual depth in all of the existing ranges, and also showed the projected depths expected upon completion of the so-called 40 foot channel project. The new 'Torresdale Project' was being dredged, but at the time of the grounding it had not been completed and was not marked either by buoys or range lights. The depth figures appearing in the channel depth statement of May 3, 1963 for the 'Torresdale Range' were actually the figures of the depths occurring in the new unmarked and uncompleted 'Torresdale Project.' " (*Infra*, p. A27)

In the face of the Third Circuit's foregoing analysis of uncontradicted facts in the record the second majority

decision of the Third Circuit (after rehearing) cannot be supported and is in direct conflict with the principles enunciated by the Supreme Court of the United States in *Indian Towing Company v. United States, supra.*

Chief Judge Seitz apparently changed his conclusion during the time intervening between decisions to join the previous dissenting Judge Van Dusen, but without furnishing any explanation in the opinion.

The initial majority opinion, dated September 29, 1971, which reversed the District Court, and found for the appellants, included a dissenting opinion by Judge Van Dusen stating:

> "The standard of skill and knowledge required by a pilot is such that Pilot Lappe must be held to know the approximate depth of the channel he was navigating and he may not be permitted to rely on two ambiguous governmental documents to relieve him of that duty." (*Infra,* p. A34)

Yet, the Dissenting Opinion overlooked the District Court's conclusion that the May 3 depth statement was not ambiguous (305 F. Supp. at 893).

However, after resubmission following the granting of the Government's Petition for Rehearing, when it was finally accepted that there was no ambiguity in the documents, Judge Van Dusen, now writing for a majority of two, concluded:

> ". . . Lappe could not have been relying on that May 3, 1963 statement as an accurate statement of depths in all those portions of the river traversed by his vessel . . ." (*Infra,* pp. A46-A47)

Judge Van Dusen, then abandoning the "ambiguity" point, reached into the channel depth statement and relied

on a piece of irrelevant evidence mentioned for the first time in the Government's Petition for Rehearing. He concluded that the pilot should not have relied on the channel depth statement, or could not have relied on it, because the depths shown for Keystone Range (a short range further upriver) (L-9) were 23.8 feet or less, and therefore insufficient for the GERWI.

Keystone was unrelated to this grounding. The inaccuracy of its published depths or its alleged impact on Torresdale was never raised by the United States at the Trial Court level or on appeal before rehearing, thus affording no opportunity for rebuttal.

The pilots, including Lappe, were well aware from information disclosed by the Army Engineers from time to time to individual pilots that the dredging activities in Keystone in both "existing" and "project" ranges had increased the depths from 23.8 to 42 feet, more than sufficient for deep draft vessels such as the GERWI, depths almost doubling over the months of dredging.

Furthermore, Keystone Range "project" and the "old" or "existing" channel had coincidental center lines so that the project overlapped the "existing" channel on both sides of center, which was marked by range lights. Therefore, navigators had no choice but to proceed in the "project" since they were obliged to follow the range lights. This situation is distinguishable from that in the "existing" channel of Torresdale Range, as marked by range lights, which had channel limits and a center line quite different from the "project" channel.

The United States should not be permitted to escape responsibility for the negligent performance of its assumed duties by shifting it to a pilot and imposing on him the onerous and impractical task of discovering in what respects the Government may have failed to perform its

duties as represented to users of federally managed waterways.

II. Conflict With the Principles Established by This Court in the *China*, 7 Wall 53, 58 (1868), and *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406, 416-417 (1901).

The *China* and the *Homer Ramsdell Transportation* cases established that a vessel owner should not be denied recovery because of the negligence of the vessel's compulsory pilot.

The alleged negligence of the GERWI's pilot in relying on the Government's navigation documents was quite clearly the Third Circuit's basis for denying recovery to Appellants, including the GERWI's owner. No fault was found on the part of the vessel owner, Master or officers.

The second GERWI decision, therefore, is in clear conflict with the rule of this Court that the negligence of a compulsory pilot (305 F. Supp. 882, 884) cannot be imputed to the vessel owner as plaintiff *in personam*, and that a compulsory pilot's negligence cannot bar the recovery of a vessel owner as plaintiff *in personam* from a negligent defendant.

Assuming that the Third Circuit's criticism of the GERWI pilot's inquiries and investigations amounted to negligence, the decision is clearly in conflict with the mandates of this Court by failing to allow recovery of appellants against the United States for publishing false and misleading information on which the vessel was entitled to rely and which caused the damage sustained by the GERWI.

III. Conflict With Decisions of the Courts of Appeal for the Second and Fourth Circuits.

The Courts in both the Second and Fourth Circuits have uniformly permitted pilots to rely on the Government's

navigation charts, the position of navigation aids such as lighthouses and range lights, and other navigation information published by the United States, so long as there is no apparent ambiguity or suspicion of inaccuracy.

A. Second Circuit.

In *Afran Transport Company, Owner of Steamship* NORTHERN GULF *v. United States of America,* 309 F. Supp. 650 (S. D. N. Y. 1969), affirmed 435 F. 2d 213 (2 Cir. 1970), cert. den. 404 U. S. 872, the NORTHERN GULF stranded on a well-charted rocky ledge at the entrance of Casco Bay approaching the harbor of Portland, Maine because West Cod Ledge Rock Buoy No. 2 was off-station approximately 350 to 400 yards from its charted position. The United States was held solely at fault for failing to discover the buoy's off-station position and failing to restore it to its proper position, and the pilot, master and officers of the vessel were exonerated.

It was contended on appeal that the failure of the pilot and ship's officers to ascertain the exact location of the displaced buoy prior to the stranding should have rendered the vessel contributorily at fault. The opinion was written by Judge Tenney in the District Court and affirmed by the Second Circuit, Judge Medina writing for the Court without dissent.

The Court rejected the government's contention that the pilot and officers of the vessel should have had reason to suspect the buoy was off-station or should have made some independent inquiry. It held:

> "For, in the absence of some suspicious circumstance or notice, navigators are entitled to rely upon the representations made in the government charts relative to the location of the buoys. See *The Clevelander,* 83 F. 2d 947, 949 (2d Cir. 1936); *Trinidad Corp. v. S. S. Sister*

Katingo, 280 F. Supp. 976, 977 (S. D. N. Y. 1967); *Chesapeake & O. Ry. v. United States,* 1964 AMC 2651, 2654 (E. D. Mich.), amended 1966 AMC 1883, 1884 (E. D. Mich. 1962) (not otherwise reported)." (Pp. 215-216)

Similarly, the District Court in the GERWI correctly concluded that there was no ambiguity in the statement of channel depths which would put the pilot on notice of insufficient depths of the range lighted channel (305 F. Supp. 882, 893). However, the GERWI's Trial Court committed a basic mistake leading this Circuit into direct conflict with the Northern Gulf. It erred in concluding that the pilot should have known that the published depths did not relate to the "existing" channel marked by range lights and buoys but to the unmarked "project" channel. The District Court also mistakenly assumed that the pilot should have navigated the GERWI in the "project" channel.

The GERWI Court repeatedly refused to be guided by uncontradicted witnesses: the professional expertise of the Coast Guard navigators and United States chart makers (*Supra,* p. 6) the Third Circuit has failed to appreciate the absolute necessity of ocean-going vessels to follow range lights.

If the decision after rehearing is permitted to stand, the Government is exonerated for continuing to operate range lights and buoys on an abandoned channel and for publishing depths apparently relating to that channel, notwithstanding that, without notice, such depths related to another incompleted "project" channel.

There was no lawful or reasonable means for the GERWI to avoid this grounding. The District Court and the Third Circuit after rehearing would require the GERWI to ignore the government range lights and buoys and to navigate in

the "project" channel of Torresdale Range, as well as to ignore the instructions of the U. S. Coast Guard Buoy Tender ZINNIA to proceed in the existing channel to the left of the dredge which was occupying the "project" channel (305 F. Supp. at 884).

B. Fourth Circuit.

Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951), reversing and remanding 95 F. Supp. 298, is in conflict with the principles of the GERWI decision. In *Somerset,* the owners of the T. H. ANDERSON sued for loss by stranding on a wreck sunk by the United States in the navigable waters of the Chesapeake Bay. It was alleged the loss was due solely to the negligence of the United States in creating and marking the wreck. The District Court dismissed the complaint, finding no liability on the Government, and faulty navigation on the part of the plaintiff. The Circuit Court reversed the District Court, concluding that the sinking was due both to the negligence of the United States and the faulty navigation of the ANDERSON. The Circuit Court for the Fourth Circuit, in finding that the damage resulted from the mutual and concurrent fault of both parties, applied the admiralty rule dividing the loss equally between the parties.

Somerset, in holding the United States liable, implicitly rejected the contention that the pilot should have sought information about the wreck in addition to that furnished him by the Government. The Fourth Circuit held:

> "We do not hesitate to state that, under a close case, in the balancing of the two social interests here involved—the convenience of the Coast Guard in servicing the buoy, and the safety of maritime navigation—we strongly favor the latter." (P. 637)

The policy in the GERWI runs directly counter to the foregoing policy articulated by the Fourth Circuit.

The holding of the Fourth Circuit establishes that "the safety of maritime navigation" is of prime importance and that such safety can be more nearly achieved only when the navigation information disseminated by the Government is accurate, reliable and free of misrepresentation.

The Third Circuit has committed a serious mistake by ignoring any consideration of the safety of navigation and adopting the absurd and dangerous principle that navigation information furnished by United States should not be relied upon, even where it gives the appearance of being complete and accurate.

IV. The Writ Should Be Granted Because of the Extraordinary Adverse Effect of the Gerwi Decision on the Safety of Navigation and the Preservation of Our Ecology in Navigable Waterways Managed by the United States.

The GERWI decision is contrary to public policy and the national interest because of its adverse impact on the safety of navigation. The decision, in effect, held the United States Army Corps of Engineers had not assumed the work of channel maintenance (surveying, dredging and publishing depth data) in the Delaware River, and had not misled navigators into thinking it had assumed such a duty.

The District Court held:

> "We are unaware of any statutory requirement that the United States Corps of Engineers or any other agency of the United States Government survey and maintain the 25′ channel in the Torresdale Range at regular and frequent intervals. It is true, as the libel-

lants point out, that Congress has the general power to regulate navigable waterways in interstate or foreign commerce. The Constitution, Art. 1, Section 8, Cl. .3. But this grant of power certainly is not an assumption of duty to make all interstate waterways navigable." (*Infra*, pp. A13-A14)

The Court went on to state:

"But we do not infer from these general statutes the need to maintain depth in Torresdale Range." (*Infra*, p. A14)

The Government argued in its main appeal brief before the initial majority decision reversing the District Court, that it could stop publishing notices of the depths of the "existing" Torresdale Range channel marked by range lights and buoys (and presumably any channel range in any navigable river of the United States) without notice; thereafter, because it abandoned the Delaware River channel and without notice did no maintenance from 1957 until after the grounding in 1963, the Government contended it was, therefore, free of any duty to publish.

This extraordinary view of the United States Government's obligations to mariners and of its management of navigable waterways was asserted by the Department of Justice despite its admission that channel depth statements were issued for the Upper Delaware River between Philadelphia and Morrisville every two or three months at the least, or every year at the most, since the Upper Delaware River was opened in 1933 (Main Appeal Brief of the United States, footnote 52, p. 41).

As a result of the Gerwi decision, therefore, it can reasonably be expected that the Army Corps of Engineers will henceforward reject every assertion that it has any responsibility whatsoever for its negligence in managing federal waterways or publishing depth information.

A clear and definitive statement is required by this Court defining the responsibility of the United States has in the management of navigable waterways of this country and of the standard of care to which the Corps of Engineers should be held.

The United States Supreme Court has specifically held that Congress intended the Government not only to have paramount responsibility to keep channels clear of obstructions for navigation, but to improve and enlarge their "navigable capacity" and "navigability." *U. S. v. Republic Steel Corp., supra* p. 9; *U. S. v. Chicago M. St. P. & P. R. Co., supra,* p. 9; *Everitt v. U. S.,* 204 F. Supp. 20, 21 (S. D. Tex. 1962); *Pioneer Steamship Co. v. U. S.,* 176 F. Supp. 140, 146-148 (E. D. Wis. 1959).

A. *Conflict With Intent of Congress as to U. S. Army Corps of Engineers:*

Congress has charged the Secretary of the Army and the Chief of Engineers with insuring that navigable waterways remain unobstructed and safe for navigation (33 USC, Section 401, 403, 407, 409, 413). Notices to mariners to keep navigators informed of changes in channel conditions and depths of channels available for use are published by the Army Engineers pursuant to statutory authority (33 USC, Section 540, 541, 542, 557(a) and (b) and 562). Such regulations as may be required are promulgated by the Secretary of the Army and distributed by the District Engineer pursuant to the provisions of 33 CFR 209.120(a) and (e), 209.170, 209.200(a) and (b), and (g).

The United States Corps of Army Engineers has been continuously engaged in the improvement of the Delaware River and the maintenance of existing channels by surveying and dredging the River since the River and Harbor Act of June 19, 1872, subsequently modified by the Acts of

March 3, 1875, June 14, 1880, July 5, 1884, August 18, 1894, March 1907 (Report of District Engineer dated at Philadelphia, January 13, 1953, pages 11, 17, paragraph 22, House Document No. 358, 83rd Congress, Second Session).

B. *Conflict With Intent of Congress as to U. S. Coast & Geodetic Survey (Nautical Chart Division):*

The District Court's decision which has been affirmed by the Third Circuit after rehearing further frustrates the stated purpose of the Congress which authorized the Director of the Coast and Geodetic Survey under the direction of the Secretary of Commerce (33 USC 883a) in cooperation with the Secretary of the Army and the Secretary of the Navy (33 USC, 858), to publish hydrographic surveys "to provide charts and related information for the safe navigation * * *" (33 USC 883a) (L-7; 373a).

Mr. Bruder, the Assistant Chief of the U. S. Nautical Chart Division of the United States Coast and Geodetic Survey, testified that it was part of his duties to publish navigation charts known as the Coast and Geodetic Survey Charts, covering the coastal waters of the United States including the Delaware River, and that he relied upon data furnished by the Army Engineers (Bruder Dep. 12-14a).

C. *Conflict With Intent of Congress as to U. S. Coast Guard:*

The Third Circuit's opinion after rehearing which affirmed the District Court decision has also frustrated the clear purpose of Congress setting forth the statutory duties of the U. S. Coast Guard. One of its primary duties is the maintenance and operation of aids to maritime navigation (L-4). See 14 USC 2. Range lights and buoys marking and existing channel of Torresdale Range were under the management of Aids to Navigation Section, Third Coast

Guard District of New York, whose jurisdiction included the Delaware River.

The channels managed by the Engineers were made available for navigation by the installation and maintenance of range lights and buoys as shown on current charts in reference to Notices to Mariners and Channel Depth Statements affixed to the charts (see statement inserted on L-7; L-9 and L-10; 373a, 376a, 377a). (See U. S. Coast Pilot 3, *supra*, pp. 3-4.)

The extent of the participation of the U. S. Coast Guard in the management of the existing channel of the Torresdale Range is demonstrated by the following exhibits in evidence listed in Addendum to Appellants Reply Brief, L-19 and L-44 (412a, 414a; Olson Dep. 24-27a).

Doubt and confusion created by the District Court and the decision of the Third Circuit after the rehearing as to whether or not the United States has any such duties (statutory or otherwise) as surveying, maintenance dredging and publishing depths for federally managed navigable waterways is a question of great national importance to all maritime interests.

Congress has stated on repeated occasions that the interests of navigation are paramount (*supra*, pp. 9, 24). The safety of interstate and foreign commerce on federally managed waterways depends on accurate charts and depth information and is a matter of great national importance and national economic significance.

The Gerwi decision invites catastrophe if the United States Army Corps of Engineers is permitted to shift its responsibility for ascertaining the accuracy of its navigation data to individual pilots.

While Congress has been encouraging the financing and construction of large deep draft cargo ships and tankers, it has also recently restated its purpose of pro-

tecting the shorelines of the nation from pollution by oil and other hazardous substances. Federal Water Pollution Act, Public Law 92-500, 92nd Congress, S.2770, 41 Law Week 79.

It is of the highest national importance to protect the marine ecology of our rivers, harbors and coastlines from the disastrous effects of the GERWI decision on the safety of navigation of deep draft vessels.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD W. PALMER,
Counsel for Petitioner.

Dated: Philadelphia, Pa.
January 29, 1973

Appendix.

OPINION OF THE DISTRICT COURT.

KOMMANVITTSELSKAPET HARWI
(ROLF WIGAND) OWNER OF THE
MOTOR VESSEL, GERWI

v.

UNITED STATES OF AMERICA.

No. 39 OF 1964.

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA.

SEPT. 8, 1969.

Richard W. Palmer, and Raul Betancourt, Jr., Rawle & Henderson, Philadelphia, Pa., for plaintiff.

Drew J. T. O'Keefe, U. S. Atty., and Joseph R. Ritchie, Jr., Asst. U. S. Atty., Philadelphia, Pa., Thomas F. McGovern, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., for defendant.

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW, AND ORDER.

WOOD, *District Judge.*

The libellants brought suit under Section 2 of the Suits in Admiralty Act, 46 U. S. C. § 742 for damages

incurred by the freighter GERWI when it grounded on a shoal in the Torresdale Range of the Delaware River while carrying iron ore to the Morrisville Plant of the United States Steel Company. Libellants contend that the United States Government negligently caused the grounding because it failed to regularly survey and dredge a 25′ channel in the Torresdale Range, because it failed to notify users of the Delaware River that such channel was not regularly surveyed or maintained, because it failed to publish current information as to the depth of the 25′ channel, and because it failed to mark a separate 40′ channel (which was then in the process of construction) with temporary markers so that it could be navigated. After reviewing the record of trial held from September 18 to September 25, 1968, and the briefs and proposed findings of fact and conclusions of law submitted by the parties, and hearing argument, we have concluded that the Government is not liable under any of the theories urged upon us by the libellants. Accordingly, we have made the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1. Kommanvittselskapet Harwi (Rolf Wigand) is a foreign business corporation organized and existing under the laws of Belgium.

2. On May 23, 1963, Kommanvittselskapet Harwi was the owner of the motor vessel GERWI, a Norwegian flag bulk carrier, 562′ in length and 72′ in breadth.

3. Bergens Skibsassuranseforening of Bergen, Norway, a Norwegian underwriter and added libellant in this action, was hull underwriter of the GERWI on May 23, 1963.

4. On May 23, 1963, the GERWI was under long term time charter to Emerald Shipping Corporation, who had

voyage chartered the vessel to Canadian Foreign Steamship Company for one voyage to carry iron ore from South America to the United States Steel Company at Morrisville, Pennsylvania.

5. The GERWI discharged 7,075 tons of ore at Pier 122 South, Philadelphia in order to reduce her draft before transiting the Delaware River to Morrisville.

6. On May 23, 1963, at about 12 o'clock noon, the GERWI left Pier 122 for Morrisville with 15,349 tons of iron ore remaining on board; her draft was 27′ 11″ forward and aft, as observed in fresh water at Pier 122 South.

7. The compulsory pilot assigned to the GERWI, R. A. Lappe, was at the time herein considered duly licensed by the State of Pennsylvania to pilot ships of foreign registry up the Delaware River (N. T. 24-8).

8. The decision of how much draft any given ship might take up the Delaware was the responsibility of the individual pilot (N. T. 531).

9. Pilot Lappe had expected to have a depth of 29′ 9″ plus four feet of high tide on this Torresdale Range, giving a depth of 34 feet available for a 27′ 11″ draft vessel (N. T. 37).

10. The GERWI proceeded upriver in fair sunny weather with a light 5-6 knot wind. Visibility was excellent (N. T. 33).

11. The master of the GERWI, Captain O. Kalve, was concerned about the tide and before leaving Pier 122S asked the pilot, R. A. Lappe, about the height of the tide and was assured that they would have at least three feet over mean low water (R. 176, 180).

12. The GERWI reached the Tacony-Palmyra Bridge above Philadelphia at 1309 (e.g. 1:09 p.m.) where the tide

was estimated by the pilot Lappe to be four feet above mean low water (N. T. 58-9).

13. The pilot Lappe had decided to navigate the Torresdale Range area through the old or 25′ channel rather than the new or 40′ project channel. At this time the 25′ channel was marked with range lights and the 40′ project channel was not so marked.

14. Before entering Torresdale Range, the pilot Lappe attempted without success to establish radio contact with a flotilla consisting of a dredge and a drill working in the river channel in Torresdale Range (N. T. 43).

15. Thereafter and before the GERWI entered Torresdale Range, the Coast Guard cutter Zinnia responded by radio to the GERWI advising the pilot to pass the flotilla on the Pennsylvania side of the range (N. T. 45-6).

16. The pilot stopped the vessel's engines to turn into the 25′ or old range and then shaped up on the centerline of the range lights and buoys in the channel. The GERWI was then brought to the left half of the channel or Pennsylvania side to clear the dredge President and the drill, which was in the New Jersey half of the channel (N. T. 46-7).

17. The GERWI touched bottom at 1325 (e.g., 1:25 p.m.) in the left half of the 25′ channel.

18. It is uncertain whether the shoal upon which the GERWI was grounded was man-made (and thus perhaps a result of the dredging operation nearby) or whether it was an upcropping of a natural formation.

19. At the time the vessel grounded, the GERWI's starboard side was lined up on the range lights in the old or 25′ channel so that it was in the left or Pennsylvania half of the existing channel (N. T. 193-4).

20. After the grounding, the GERWI proceeded without further incident to Morrisville where her cargo was discharged (N. T. 196-7).

21. The GERWI then went into drydock at Sun Ship Building and Drydock Company, Chester, Pennsylvania, on May 25, 1963 and remained there until June 11, 1963 undergoing repairs (N. T. 197, L-23, 24).

22. The cost of repairs and necessary incidental expenses totaled $203,710.46. Libellant's claim as stated in L-26, in the total amount of $203,710.46, of which Skibs Bergens has paid $170,015.03 and Rolf Wigands has paid $33,695.43, was reduced as follows:

Item 27	Disallowed	$1,166.08
Item 35	Duplication of item 27	1,165.71
Total disallowed		$2,331.79
The total amount claimed is thus		$201,378.67.

(N. T. 218-227)

23. During the period relevant to this litigation, it was the practice of the Army Corps of Engineers stationed in the area of the Torresdale Range to publish statements from time to time which stated the results of sweeps of certain areas of the upper Delaware which the Engineers deemed necessary or potentially helpful to navigation in general. There was no program and no order directing the engineers to dredge or sweep any given channel at any given time or at any given interval. The activities of the Engineers in any given channel in this regard were limited by available manpower and financial resources, and by priorities established by other assignments. It was the practice of the Engineers to publish and mail or occasion to parties interested in navigation information regarding

such matters as the progress of a new project channel or the results of a recent sweep conducted of an existing channel. During the period here considered, the Corps of Engineers was assigned and authorized to complete the construction of the 40 foot project channel in Torresdale Range (N. T. 449-470).

24. Prior to and during May 1963, there was a considerable demand by parties interested in navigating the upper Delaware River upon the United States Army Corps of Engineers for information concerning the new project or 40 foot channel in Torresdale Range. Although range lights had not yet been installed and the channel had not been deepened to 40 feet in all places, the channel was being used by some navigators (N. T. 454-8).

25. Prior to the accident, neither the United States Corps of Engineers nor any other instrumentality of the United States Government had any notice of the existence of a shoal in this area (N. T. 410, 607).

26. The following depth chart was released by the United States Army Corps of Engineers on May 3, 1963, and mailed to a number of interested navigators:

U. S. ARMY ENGINEER DISTRICT, PHILADELPHIA
CORPS OF ENGINEERS
Custom House - 2nd & Chestnut Sts.
Philadelphia 6, Pa.

NAPOP-N 3 May 1963

DELAWARE RIVER, PENNSYLVANIA AND NEW JERSEY
Ship Channel from Allegheny Ave., Phila. Pa., to
Penn. R. R. Bridge, Trenton, New Jersey

Name of Channel Route	Date of Survey	PROJECT Feet - Width	PROJECT Miles (Feet) Length	PROJECT Feet Depth	Minimum depths in channel entering from seaward: Left Channel Edge Feet	Left Outside Quarter Feet	Middle Half of Channel Feet	Right Outside Quarter Feet	Right Channel Edge Feet
Tarbet	26 Oct 62	400	0.70	40	34.1	37.7	40.8	40.8	38.6
Fisher	26 Oct 62	400	0.31	40	38.5	39.8	39.9	43.5	43.6
Bray	17 Oct 62	400	0.74	40	35.9	35.9	40.3	40.9	41.2
Delair	17 Oct 62	400	0.98	40	39.1	39.6	40.1	39.3	37.6
Bridesburg	12 Mar 63	400	0.31	40	41.5	41.2	40.5	42.8	42.2
Frankford	14 Mar 63	400	1.05	40	37.8	39.6	41.2	41.0	36.2
Tacony	14 Mar 63	400	1.17	40	40.1	40.1	42.0	41.7	41.7
Torresdale (B) (C)	7 Nov 62	400	1.39	40	30.6	37.2	33.1	29.9	37.1
Mud Island (B) (C)	9 Nov 62	400	1.67	40	34.1	33.8	28.8	30.0	24.5
Enterprise	19 Mar 62	400	1.70	40	38.1	42.3	41.4	41.1	37.3
Beverly	10 May 62	400	0.65	40	33.3	37.2	35.2	32.6	32.2
Edgewater	10 May 62	400	1.37	40	30.7	35.3	37.1	37.1	34.5
Devlin (C)	10 May 62	400	1.03	40	31.2	37.7	38.2	38.2	25.2
Lehigh	29 Aug 62	400	0.66	40	42.7	42.2	42.3	42.2	42.2
Canal	29 Aug 62	400	0.19	40	44.2	43.3	43.7	43.3	43.3
Bristol	30 Mar 62	400	0.62	40	40.8	42.4	42.1	42.4	41.4
Keystone (A) (C)	14 Dec 62	200	0.48	25	21.5	21.1	23.8	23.5	22.5
Landreth (A) (C)	14 Dec 62	300	0.41	25	20.3	22.3	26.3	26.9	26.5
Landreth	27 Mar 63	400	0.81	40	41.3	41.7	41.3	38.3	36.3
Riverview	27 Mar 63	500	0.20	40	41.5	41.7	42.0	37.9	33.6
Foundry	27 Mar 63	500	0.22	40	38.3	42.3	42.0	32.8	27.5
Church	27 Mar 63	500	0.19	40	38.3	41.3	39.1	28.3	22.5
Florence	4 Apr 63	450	1.34	40	31.4	33.3	36.3	33.3	29.9
Roebling	28 Mar 63	400	0.34	40	31.9	33.1	37.6	40.1	29.9
Kinkora	9 Apr 63	400	1.15	40	33.9	35.1	36.0	27.1	34.1
Penn	10 Apr 63	450	0.35	40	29.3	31.8	39.3	27.1	32.5
Newbold	10 Apr 63	400	0.52	40	20.9	22.6	23.6	14.2	10.2
Blake	25 Jan 62	400	0.17	25	21.7	20.6	21.6	26.3	29.1
Whitehill	29 Jan 62	300	1.03	25	19.4	19.4	19.8	19.5	20.9
Raritan	27 Feb 62	400	0.24	25	17.4	17.6	22.9	26.4	25.4
Bordentown	30 Jan 62	300	0.65	25	11.9	12.7	14.2	21.6	22.0
Duck Island	4 Mar 62	300	1.25	25	8.0	9.3	11.2	12.6	13.0
Perrsville	2 Mar 62	400	0.24	25	9.5	12.0	13.8	14.3	13.3
Bilas Island	1 Mar 62	300	0.38	25	21.5	23.5	19.5	16.7	13.5
Cochran	3 Mar 62	300	0.31	25	18.3	25.6	17.7	14.5	10.3
Moon	3 Mar 62	500	0.19	25	7.3	9.0	19.6	21.5	19.0
Trenton	3 Mar 62	500	0.20	25	10.5	13.2	14.7	14.3	13.8
Trenton	24 Aug 55	200	0.33	12	-	-	12.0	-	-
Lalor	24 Aug 55	200	0.26	12	-	-	15.2	-	-
Landing	24 Aug 55	200	0.20	12	-	-	10.4	-	-
American	24 Aug 55	200	0.21	12	-	14.7	14.3	-	-
Federal	24 Aug 55	200	0.09	12	-	7.1	15.5	-	-
Bridge	24 Aug 55	300	0.08	12	-	-	14.0	-	-
Auxiliary Channel East of Burlington Island									
Range I	17 Apr 51	200	0.28	20	23.7	22.4	18.7	18.7	7.2
Range S	17 Apr 51	200	0.25	20	12.9	17.4	17.4	22.5	19.7
Range L	17 Apr 51	200	0.10	20	10.7	18.9	18.9	22.6	18.7
Range A	17 Apr 51	200	0.19	20	8.7	18.7	18.7	22.6	18.7
Range H	17 Apr 51	200	0.12	20	11.2	19.7	19.7	24.4	23.7
Range D	17 Apr 51	200	0.09	20	12.7	20.4	20.4	23.7	16.3
In front of Turning Basin	17 Apr 51	200	0.18	20	13.5	13.4	13.4	18.5	20.7

NOTE: All depths refer to local mean low water.
Maps showing the depths of channel are sold to the public at the cost of reproduction. Requests for such maps, including the locality desired, should be made to the District Engineer.

(A) Old Channel
(B) Dredged to 35 feet, except over rock areas
(C) Dredging to 40 ft. in progress

DAVID N. HUTCHISON
Major, CE
Acting District Engineer

27. Pilot Lappe read and understood the depth shown in the Engineers' Channel Statement of May 3, 1963 (Ex. L-9), as referring to the old or 25′ channel which was still marked by range lights and buoys which, he concluded, allowed 29.9 feet on the range and then allowed four more feet for the tide (N. T. 121).

28. The fact that the new or 40′ channel and the old or 25′ channel on Torresdale Range were not coincident was common knowledge among shipping and navigation interests concerned with the upper Delaware River (N. T. 459-60).

29. Pilot Lappe did not have nor did he inspect at the Pilots Association the Survey Sheet of November 7, 1962, prepared by the Corps of Engineers (R-I) on which it clearly appears that the old (25′) and the new (40′) Torresdale Range are separate and do not coincide (N. T. 165). Pilot Lappe, however, knew prior to May 23, 1963, that there was an old channel and a new project channel in the Torresdale Range area and that these channels were not coincident, and he did not need the Survey Sheet of November 7, 1962 (R-I) to apprise him of this fact (N. T. 165).

30. The Fairless plant of the United States Steel Corp. at Morrisville had located in it an office of Norton, Lilly & Co., in which the times of arrival of ore fleets at Morrisville were scheduled. In November 1960 the controlling depth for carriers operating under pilotage was 24′ 6″. There was no formal upriver committee as such until May 12, 1963, when the Board of Directors of the Pilots Association designated two pilots members. Prior to that time the pilots had liaison representatives who were not authorized to bind the pilots (N. T. 520, 572). On May 10, 1963, Captain Powell of Norton, Lilly met with the Pilots Association on increasing the draft to 28 feet. He showed them an overlay, copied

by him and unwittingly misaligned and then reproduced, which erroneously showed the new 40′ channel in Torresdale Range aligned with the old 25′ channel. Pilot Lappe was not at this meeting (Deposition of Powell, 48-53; 587).

31. Pilot Lappe had no personal knowledge that the Powell overlay was posted at the Pilots Association office but Captain Powell had personally shown him the overlay when either the EDERA arrived or when the RIO ORINOCO arrived at Morrisville two or three days before the GERWI grounding on May 23 (N. T. 151). The Powell overlay had in fact been posted on the bulletin board at the Pilots Association (N. T. 146).

32. The first 28′ draft ship which sailed from Philadelphia to Morrisville was the ORE VENUS on May 12, 1963—28′; followed by the GALASSIA on May 13, 1963—28′; third the RIO ORINOCO on May 18, 1963—28′; fourth the EDERA on May 21, 1963—28′. The GERWI was the fifth 28′ ship (Powell Deposition 56).

33. Pilot Lappe had taken both the RIO ORINOCO on May 18 and the EDERA on May 21 up the Torresdale Range (N. T. 137-8).

34. In October 1962, Captain Powell had reported a shoal or grounding by the TYME ORE on the New Jersey side of the Torresdale Range, and the United States Corps of Engineers sounded this area on October 4, found a shoal, had the shoal removed by a contractor and swept it again on October 19, 1962 (N. T. 417).

35. Aside from soundings taken in 1962, the depth of the old e.g. 25′ channel was not maintained by the Corps of Engineers after 1957, and statements reporting the depths of the old channel were not published after January 1957 (N. T. 388-9).

36. On November 20, 1958, the following document (quoted in relevant part) was distributed by the United States Army Corps of Engineers to its District offices:

"PROJECT OPERATION

Navigation Lights, Aids to Navigation, Navigation Charts, Lake Survey Reports and Related Data Policy, Practice and Procedure

"1. *Purpose and Scope.* This manual prescribes the policy, practice and procedure to be used by all Corps of Engineers installations and activities in connection with navigation lights and other aids to navigation, chart data and Lake Survey reports. * * *

"3. *Cooperation with Coast Guard.* a. District Engineers will furnish direct to Coast Guard District Commanders information as to channel and harbor improvements which may require new aids to navigation or require changes to existing aids. This information will include: (1) Information as to the authorization by Congress of a project involving changes in channel limits, breakwaters, etc., including a copy of the project document; (2) the proposed operations on such projects during the next fiscal year, to be furnished annually on the release of the budget estimates; (3) plans showing the final location of the channel limits or structures to be furnished at the time work is undertaken. Changes in channel limits affecting navigation aids, made under general or specific provisions of law, should be made the subject of prior conference with the Coast Guard District Commander who will be promply informed as to the approval of such changes and the probable date of completion of the work.

"b. District Engineers will furnish direct to the various Coast Guard District Commanders for their

immediate information any facts which may come to their attention in connection with their duties which will be of benefit to the Coast Guard in maintaining its system of aids to navigation, including statements as to the displacement of or defects in any such aids to navigation. * * *

"4. *Navigation Aids of the Corps of Engineers.* a. Whenever channel or other improvement is being prosecuted necessary temporary markers such as ranges, light poles, etc., should be installed and maintained by the District Engineer pending the installation of permanent aids by the Coast Guard. The Coast Guard desires that information regarding aids to navigation installed or maintained by District Engineers in connection with the works of harbor or channel improvement under their direction be furnished promptly in order that such information may be included in Notice to Mariners as published by the Coast Guard and be shown where desirable on the charts of the waters concerned.

"b. District Engineers will notify the Coast Guard District Commander, using for this purpose the special blank form CG-2554, in every case where aids to navigation for the purpose of marking works of harbor or channel improvement are established or discontinued. Notice should be given of such aids as may be of use or interest to general navigation, but need not be given as to such buoys, lights, or fog signals as are of temporary or unimportant character, or of importance only to the Corps of Engineers, nor as to lights or fog signals on ferry slips and on piers used only by certain vessels, nor as to stakes, bushes, and barrel buoys marking shallow and little-used channels. * * *

"6. *Information to be Furnished by the Corps of Engineers.* (Reports Control Symbol not required pursuant to paragraphs 17k and 17u, AR 335-15.)

"a. District Engineers having charge of improvements of harbors and waterways shown on charts of the Navy Hydrographic Office or of the Coast and Geodetic Survey will report harbor and waterway channel conditions promptly as ascertained, using prescribed standard tabular forms to the Hydrographer, Hydrographic Office, Navy Department, Washington 25, D. C.; Commandant and District Commanders, U. S. Coast Guard; the Director, U. S. Coast and Geodetic Survey, Washington 25, D. C. (in duplicate); and the Chief of Engineers, attention: ENGWO. The standard tabular forms are as follows:

"(1) For channels 400 feet wide and greater, (Form No. 443).

——— *HARBOR,* ——— *(State)*

Name of Channel	*Date survey*	*Project*			*Minimum depth in each ¼ width of channel entering from seaward*			
						Mid-channel		
		Feet width	*Miles length*	*Feet depth*	*Left outside quarter feet*	*Left inside quarter feet*	*Right inside quarter feet*	*Right outside quarter feet*
Tybee Range	6-58	500	1.64	30	30	31	28	23
Bloody Point	6-58	500	2.81	30	30	30	29	25

* * * * * * * * * * * *

"c. The prompt dissemination of the latest detailed information concerning channel conditions is of utmost importance, and necessary measures will be taken to insure that such information is reported without delay simultaneously to the Hydrographic Office, the Coast Guard, and the Coast and Geodetic Survey. When a dangerous shoaling is found during the

progress of a survey, information thereon will be furnished immediately to the above-mentioned agencies so that such information may be made available to mariners promptly and buoys shifted to mark the shoal. Descriptions of any dredging or other operations in important channels in tidal waters either in progress and not already reported, or soon to be undertaken, together with a statement of the work and expected duration, will also be reported in order that naval and other vessels may be warned to look out for dredges and other plant, temporary markers and lights."

DISCUSSION.

As previously stated the libellants have advanced four theories upon which they assert the government should be held liable for negligently causing damage to the GERWI. We will consider these *seriatim* in the order that they appear in the libellants' "Main Brief After Trial."

I. It is first contended that the government assumed the duty of regular maintenance and surveillance of the 25' or old channel and engendered reliance thereon by navigators, and that the failure of the government to carry out these duties caused the grounding of the GERWI. In this respect the libellants direct us to statutes relating to navigable waterways as well as to cases in which government maritime agencies have been held liable for negligence on navigable waterways.

We are unaware of any statutory requirement that the United States Corps of Engineers or any other agency of the United States Government survey and maintain the 25' channel in Torresdale Range at regular and frequent intervals. It is true, as the libellants point out, that Congress has the general power to regulate navigable waterways in interstate or foreign commerce. Constitution, Art. 1, Sec-

tion 8, cl. 3. But this grant of power certainly is not an assumption of the duty to make all interstate waterways navigable. Title 33 U. S. C. §§ 401 and 403, also cited by the libellants, merely provide that bridges, causeways, dams or other substantial obstructions upon such waterways may not be constructed without the approval of Congress, the Chief of Engineers and the Secretary of the Army. Title 14 U. S. C. § 2 and § 81 gives the Coast Guard general authority to "develop, establish, maintain and operate * * * aids to maritime navigation, * * *." on such waterways. But we do not infer from these general statutes the duty to maintain depth on Torresdale Range.

The case authority cited to us by libellants generally restates in a maritime context the familiar torts principle that one who undertakes, gratuitously or otherwise to render service to another is subject to liability for failure to exercise reasonable care if harm is suffered because of another's reliance upon the undertaking.[1] As the Supreme Court stated in Indian Towing Co. v. United States, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955):

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light * * * and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable * * *." (350 U. S. at p. 69, 76 S. Ct. at pp. 126-127)

1. See Restatement of Torts 2nd (1965) § 323.

See also United States v. Sandra & Dennis Fishing Corp., 372 F. 2d 189 (1st Cir. 1967) (negligent rescue); United States v. DeVane, 306 F. 2d 182 (5th Cir. 1962) (negligent rescue); United States v. Lawter, 219 F. 2d 559 (5th Cir. 1955) (negligent rescue); Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951) (negligent marking of wreck).

Granting this general principle, however, we do not think that the government ever assumed the duty to dredge and survey the 25′ channel on a regular basis, nor do we think that it did anything to mislead navigators into thinking that it had assumed such a duty. It was the practice of the Corps of Engineers stationed in the area of Torresdale Range to publish statements from time to time which showed the results of sweeps or dredges of certain specified areas of the upper Delaware River (See Libellants' Exhibits L-7, L-9, L-10, L-12, L-13, L-16, L-17). These statements did not purport to be the results of a regular surveying; the date of the surveying and the range surveyed were specified. As a matter of fact the government did not survey the 25′ channel at Torresdale or other nearby channels on a regular basis. The officers of the Corps of Engineers testified that they did not provide such a service, and that they were limited in what they could do by their available resources and manpower. In the period preceding the grounding of the GERWI, the Corps of Engineers was engaged in deepening a separate channel in the Torresdale area to a 40′ depth. In the course of this deepening project, the Engineers published and distributed for the general information of navigators, statements which showed changes in the depth of the 40′ channel area. With the exception of a sounding taken in 1962 with a Bludworth fathometer following a grounding in the Torresdale area (cf. Libellants' Ex. 36), the 25′ channel had not been surveyed for approximately seven years. From all the evidence we conclude that the government

undertook nothing more than to represent that it made surveys of certain ranges at certain times with certain specified results. The cases cited to us by the libellants are mostly instances where the government has undertaken to perform a single service on a single occasion; we cannot lightly presume the assumption of a duty which involves a costly course of conduct over an extended period and the undertaking of which would be tantamount to making the government the virtual insurer of navigation on the Delaware.

Even assuming *in arguendo* that the government had assumed such a duty, the libellants have not carried their burden of convincing us that the failure to survey at some given interval was the cause of the grounding of the GERWI. It is uncertain when the shoal upon which the GERWI grounded was formed. Moreover, we were unable to determine whether the shoal was man-made or natural: the formation could have been caused either by reformation of the river itself, by the dredging operation that was taking place nearby, or for some other reason of which we are not aware. Consequently, even if the government had surveyed the Torresdale 25′ channel, say, every year, we are not convinced that this would have averted the unfortunate accident of the GERWI.

II. The second theory advanced by the libellants in seeking to hold the government liable is that "the United States was negligent in failing to notify the users of the waterway that the existing channel in Torresdale Range as marked in May 1963, by range lights and buoys, was not being surveyed or maintained, and could not safely be used for navigation." (Libellants' Main Brief After Trial, p. 11). This argument is closely related to the first, and we are again confronted with an array of statutes, Coast Guard and Army Engineers regulations, and cases which we do not consider apposite in the instant case.

It is true, as the libellants suggest that, pursuant to Title 10 U. S. C. § 7392 and Title 44 U. S. C. § 213 the Secretary of the Navy is empowered, at his discretion and subject to regulations which he may prescribe, to publish "charts, maps, notices to mariners, tide tables * * * (etc.)." Pursuant to Title 33 U. S. C. §§ 557a and 557b the Chief of the Army Engineers is granted similar authority to publish information and to prescribe regulations for such publication. These enabling provisions do not, of course, require the publication of any notices to navigators. However, libellants place great emphasis on a document entitled "PROJECT OPERATION" published by the Corps of Army Engineers (L-42) which is characterized as a "manual" to prescribe the "policy, practice, and procedure to be used by all Corps of Engineers installations and activities in connection with navigation lights and other aids to navigation, chart data and Lake Survey reports." It is asserted that this document had the force of a regulation, and we are directed specifically to paragraph 6(c) page 5, which provides as follows:

> "c. The prompt dissemination of the latest detailed information concerning channel conditions is of utmost importance, and necessary measures will be taken to insure that such information is reported without delay simultaneously to the Hydrographic Office, the Coast Guard, and the Coast and Geodetic Survey. When a dangerous shoaling is found during the progress of a survey, information thereon will be furnished immediately to the above-mentioned agencies so that such information may be made available to mariners promptly and buoys shifted to mark the shoal. Descriptions of any dredging or other operations in important channels in tidal waters either in progress and not already reported, or soon to be undertaken, together with a statement of the work and

> expected duration, will also be reported in order that naval and other vessels may be warned to look out for dredges and other plant, temporary markers and lights."

The libellants apparently make two distinct arguments from these sources: first, that the government should have reported the shoaling in the 25′ or old channel; and second, that the Army Engineers should have known that navigators were depending upon publication of regular depth surveys of the 25′ channel, and it should have informed them that such surveys were no longer being performed or published.

The first argument quickly falls because we find that the government had no notice of the shoal upon which the GERWI grounded. Since we have already concluded as well that the government had no duty to drag the 25′ range at periodic intervals to discover the shoal, there was nothing which the government knew or should have known that it could have reported. Ingham v. Eastern Air Lines, Inc. and United States of America, 373 F. 2d 227 (2nd Cir. 1967) is therefore inapplicable.

The second argument falls as well because the Army Engineers, as previously stated, never undertook or represented themselves as undertaking, the responsibility of regularly surveying and dredging the 25′ channel; they simply dredged certain cities on certain occasions and reported the results to interested navigators. In any case, the document upon which the libellants rely (L-42) refers to "projects" that the Engineers are working on; the Engineers were working on the 40′ channel as a "project", but the 25′ channel was finished and was no longer a "project". Since the government never surveyed the 25′ channel regularly, never represented itself as doing so,

and had no duty to do so, it follows that it had no duty to say that such surveys were being discontinued.[2]

III. The third argument advanced by the libellants which relies essentially upon the authority previously cited, is that "the United States was negligent in failing to publish information as to the depths of the existing Torresdale Range channel as then marked by range lights and buoys and outlined on all current navigation charts." (Main Brief After Trial, p. 17). Two related arguments in this respect are urged upon us: first, it is contended that Section 6c on page 5 of the "Project Operation Manual" of the Corps of Engineers (quoted *supra*) required publication of the depths in the 25′ or old channel, since that channel was the only one marked by range lights; secondly, it is urged that the Corps of Engineers negligently published a depth statement (e.g., Channel depth statement of May 3, 1963, Libellants' Exhibit 9) which, it is asserted, in fact related to the 40′ project channel but because it was not clarified on its face and because range lights were set up in the 25′ channel but not the 40′ channel, gave the misleading impression that it referred to depths in the 25′ chanel. In regard to this latter contention, we are reminded that the pilot of the GERWI testified that he relied essentially on the May 3, 1963 depth statement in arriving at the erroneous conclusion that the 25′ or old channel was deeper than it was in fact, and further that there was testimony by several persons acquainted with nautical charts that when they looked at the May 3 statement (L-9) they would have thought that it referred to the 25′ channel marked by range lights.

We think that both of these arguments are without merit under the circumstances before us. With regard to

2. Even if this point were granted to the libellants, we still do not think that any failure in this respect was proven to be a cause in fact of the GERWI's grounding.

the first, we find nothing in the Engineers Project Manual (L-42) which requires or even suggests that a statement should have been published for the 25′ channel. We have previously concluded that the Engineers did not have the duty to publish regular surveys of all ranges. The document referred to (L-42) is merely a statement of policy and procedure from a government agency to its operational staff. It refers to situations where the Engineers are working on "projects" or "improvements" such as they were performing in the 40′ channel but not in the 25′ channel. The specific section upon which libellants chiefly rely (e.g., 6c on page 5 of L-42, quoted *supra*) refers not to the prompt reporting and dissemination of all information with regard to all channels on a given river, but rather to the prompt reporting and dissemination of specific conditions of which the Engineers become aware in the course of their work and which might create a danger to navigation. This section certainly cannot be construed to direct regular surveys of the 25′ channel on which the Engineers were not working, and from which they had no reason to suspect unusual shoaling at the time of the GERWI accident. Moreover, as previously stated, even if there were such a directive as the libellants supposed, we are not persuaded that it was a cause in fact of the GERWI grounding.

With respect to the libellants' second argument, we do not think that the government made any negligent misrepresentations in the May 3, 1963 (L-9) channel depth statement. We find it difficult to understand how a navigator, especially one familiar with the upper Delaware, could read this statement and conclude that it referred to the 25′ or old channel. In the column entitled "Project" the depth for the Torresdale project is listed as 40′. Footnote designation (A), which refers to the fact the channel project is being undertaken in the same area as an old channel in a given range, is not found in the column next to the one re-

lating to Torresdale Range. It should therefore have been clear that there were two separate channels in Torresdale Range and that the May 3 statement (L-9) referred to the 40′ project range.

Even if one concluded, which we do not, that the May 3 depth statement was *ambiguous*, we do not think that this amounts to a negligent misrepresentation for which the government should be held liable. Certainly one could hardly expect to navigate the upper Delaware with a multi-million dollar ore shipment on the basis of the information contained on a single sheet which referred to documents or sources of information which might have clarified the situation.[3] In our findings of fact we concluded from the evidence that it was common knowledge that there were at least two channels in Torresdale Range, namely the 40′ project and the old 25′ range, and that these two channels were not coincident. Moreover, there were other documents readily available from the government from which it could be determined that the two ranges took different courses: (a) the existence of separate channels could have been inferred from another notice also sent out on May 3, 1963 (Exhibit R-11) but relating to another channel, and (b) the statement of the November 7, 1962 survey could have clarified the situation (See N. T. 166).

In any event, even assuming that the May 3, statement (e.g. Exhibit L-9) was misleading and that publication of it was negligent under the circumstances, the plaintiff has not carried his burden of convincing us that the GERWI, its crew and pilot, relied on the accuracy of this statement and that such reliance was a cause in fact of its grounding. The pilot, Lappe, did testify on several occasions that he relied

3. The May 3, 1963, channel depth statement (L-9) included a footnote stating that "maps showing the depths of channel are sold to the public at the cost of reproduction. Requests for such maps, including the locality desired, should be made to the District Engineer."

primarily on the May 3 channel depth statement in deciding that he could take a ship with a 27′ 11″ draft up the channel marked by range lights on a 4′ tide. For reasons previously cited we find it difficult to comprehend how a pilot could take a large ore carrier up the Delaware in reliance of a one-page depth statement, even if he erroneously interpreted it to apply to the 25′ channel. Lappe testified that prior to May 23, 1963, he knew that there was a new project 40′ channel and an old 25′ channel in Torresdale and that the two channels were not coincident, and that he was aware of these facts independently of the May 3 statement. Knowing this it is even more difficult to understand how he could misconceive the May 3 statement which referred with respect to Torresdale Range, to a 40′ channel. His alleged reliance apparently comes down to the assertion that since the May 3 statement only referred to one channel and since only one channel had range lights, that the lighted channel must be the one referred to. In view of the pilot's knowledge, as well as the existence of other clarifying documents, we are dubious of this. Our doubts are heightened by Lappe's testimony regarding the so-called "Powell Overlay", a document prepared by Captain Powell of the Norton, Lilly office at Morrisville which erroneously and mistakenly misaligned the 25′ channel so that it appeared to be a 29′ channel. The pilot Lappe admitted that he had seen this document prior to May 23, 1963, but his testimony as to how long he looked at it was not clear. In interrogatories to counsel before trial, it was stated that Lappe had examined the Powell overlay on at least two occasions prior to boarding the GERWI (N. T. 578-9), but at trial he testified that he saw it only once and for ten or twenty seconds (N. T. 127-8). In short, we do not think that the publication of the depth statement of May 3, 1963, was the cause of the GERWI's grounding.

IV. The libellants' final theory for casting liability on the government is that "the United States was negligent in failing to mark the 40′ channel project with temporary markers such as ranges, light poles, etc." (Main Brief After Trial, p. 25). Apparently the argument here is that the government is liable for failure to install range lights on the 40′ channel because it was required by the Corps of Engineers manual for "Project Operation" at Section 4b (p. 2 of Libellants' Exhibit 42) that "whenever channel or other improvement is being prosecuted necessary temporary markers such as ranges, light poles, etc. should be installed and maintained by the District Engineer pending the installation of permanent aids by the Coast Guard"; it is contended that the compulsory pilot could not prudently navigate any channel that was not marked by range lights and buoys, but if the 40′ channel had been marked with range lights in accordance with the directive cited above, no grounding would have occurred because the pilot could presumably have navigated the 40′ channel without incident.

To the contrary, for a number of reasons we do not think that under the circumstances of this case liability may be imposed on the government because it had not installed range lights in the 40′ channel at the time of the GERWI grounding. In the first place, under the statutes previously cited it is provided that the Coast Guard or the Engineers "may" set up range lights or other markers. It is therefore a matter of discretion for these agencies whether to set up range lights at all, and if so when and where to set them up. Consequently neither the Coast Guard nor the Engineers nor the government can be held liable for failure to have range lights set up at any given time. See Kline v. United States, 113 F. Supp. 298 (S. D. Tex. 1953).[4]

4. There was no representation to the parties here concerned that the range lights would be set up in the 40′ channel by the time the GERWI reached Torresdale Range.

The cited sections of the Engineers "Manual on Project Operation" (L-42) add nothing to the libellants' case. Even under the terms of the Manual, the District Engineer is given discretion to set up "necessary" markers in channels under construction. From the record before us we gather that efforts were being made by the Engineers in this direction at the time of the GERWI grounding. In any event, the Manual on Project Operations was nothing more than an internal directive concerning work to be done from the central administration of the Engineers to the District Engineer. The directions contained therein were of internal significance only to the Corps of Engineers and did not constitute the assumption of a duty to set up the lights toward outside parties who were not even aware of the directions and could therefore not have relied on them.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction over this case.

2. Neither the United States Government nor any agency thereof is liable to any of the plaintiffs for the damages incurred by the GERWI on May 23, 1963.

ORDER.

And now, this 8th day of September, 1969, it is ordered that judgment is entered in favor of the United States of America.

OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18301, 18302

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND) OWNER OF THE MOTOR VESSEL GERWI,
Appellant in No. 18,301

AND

BERGENS SKIBSASSURANSEFORENING,
Appellant in No. 18,302

v.

THE UNITED STATES OF AMERICA,
Appellee

(D. C. Admiralty No. 39 of 1964)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 15, 1971

Before SEITZ and VAN DUSEN, *Circuit Judges* and MASTERSON, *District Judge*

Opinion of the Court

(Filed September 29, 1971)

PER CURIAM:

Kommanvittselskapet Harwi (Rolf Wigand), a Belgian corporation owning the Norwegian vessel Gerwi, brought suit against the United States under Section 742 of the Suits in Admiralty Act (46 U. S. C. § 742),[1] alleging that the Government was liable to it for damages which the vessel incurred when it grounded on rocks while it was proceeding up the Delaware River in the channel known as the Torresdale Range on May 23, 1963.

At the time of the grounding, the Gerwi drew 27 feet 11 inches of water. Its navigator[2] was relying upon a navigational chart published by the United States Coast and Geodetic Survey which showed the position of the range lights, day marks and buoys for the Torresdale Range and on the most recent channel depth statement published by the United States Corps of Engineers. The latest channel depth statement, published on May 3, 1963,[3] indicated that the minimum depth in the entire Torresdale Range was 29.9 feet. In addition, there was 4 feet of tide, so that the navigator had reason to believe that the minimum depth he would encounter in the range was 33.9 feet, which was more than adequate for the vessel's draft.

As the vessel approached the Torresdale Range, the pilot saw a Corps of Engineers dredge flotilla on the edge of the range, and attempted to establish radio contact with it. The Coast Guard vessel Zinnia responded to the Gerwi's

1. Bergens Skibsassuranseforening of Bergen, Norway, a Norwegian underwriter, was the hull underwriter on May 23, 1963, and was added as libellant in this action.

2. The vessel's navigation was in the charge of a compulsory pilot licensed by the State of Pennsylvania to pilot ships of foreign registry up the Delaware.

3. Exhibit L-9, reproduced at 305 F. Supp. 886.

call to the dredge flotilla and advised the pilot to pass the flotilla on the Pennsylvania (left of center) side of the channel.

Responding to the Coast Guard's suggestion, the pilot entered the Torresdale Range and aligned the Gerwi's extreme starboard side with the range lights marking the center of the range. As the Gerwi drew abeam of the drill boat accompanying the dredge, she struck rocks which pierced her 1, 2 and 3 port double bottom tanks resulting in the damages for which claim was brought in the District Court.

After the grounding, it became known for the first time that the Corps of Engineers had stopped surveying the "Torresdale Range" as plotted on the Coast and Geodetic charts in 1957 and that no depth maintenance was performed after 1955. No notice to mariners to this effect was given and no explanation was offered as to why mariners were not notified that the charted range was no longer being surveyed and maintained. Further, the Corps of Engineers continued to publish depth statements with respect to the depths in all of the ranges on the Delaware River. These statements purported to show the actual depth in all of the existing ranges, and also showed the projected depths expected upon completion of the so-called 40 foot channel project. The new "Torresdale Project" was being dredged, but at the time of the grounding it had not been completed and was not marked either by buoys or range lights. The depth figures appearing in the channel depth statement of May 3, 1963 for the "Torresdale Range" were actually the figures of the depths occurring in the new unmarked and uncompleted "Torresdale Project."

The appellants brought suit below charging the Government with negligence in that it published misleading channel depth statements which bore no relation to the actual depths appearing on the Torresdale Range as marked

on the navigational chart, in failing to survey and maintain the existing Torresdale Range to the depths indicated on the depth statement, and with failing to mark and thereby make navigable the new channel for which it was publishing depth statements.

After a lengthy trial without jury, the United States District Court for the Eastern District of Pennsylvania (Wood, J.) found the United States not liable under any of these theories.[4] The trial court held that the United States had no statutory or assumed duty to survey or dredge the existing channel on a regular basis, and that the United States was not negligent in failing to notify the users of the waterway that the existing channel, as marked by range lights and buoys, was no longer being surveyed or maintained. Furthermore, it was held that the Government did not make any negligent misrepresentations in the May 3, 1963 channel depth statement. The court added that even assuming negligence on either theory, it was not satisfied that appellants had proved that the grounding of the Gerwi was caused by such negligence. Finally, the court held that the United States was not negligent in failing to mark the "project" channel.

After carefully studying the record before us, we have concluded that the trial court's decision is clearly erroneous.[5]

Every professional navigator who testified in the case agreed that any reasonable navigator reading the depth statement of May 3rd would have concluded that the figures appearing therein under the heading "Torresdale Range"

4. The decision below is reported at 305 F. Supp. 882 (1969).

5. See *McAllister v. United States*, 348 U. S. 19 (1954) as to the scope of review of a judgment of a trial court, sitting without a jury in admiralty, in a negligence action: "A finding is clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 348 U. S. at 20.

referred to the depths in the channel which was marked by range lights and buoys, which the navigator was expected to rely on in navigating the river. Even the Chief of the Nautical Chart Division of the U. S. Coast and Geodetic Survey at Washington, who was in charge of the preparation of the current navigation chart in use by the river pilot on May 23, 1963 [6] testified that he understood that the channel depths shown on that chart were depths for the existing channel physically marked by range lights and buoys. Hence the trial court's finding that the navigator should have interpreted the chart as amended by the depth statement of May 3rd as referring to the depths in the unmarked, uncompleted channel is not supported by any evidence.[7]

Since there was only one marked channel through which the Gerwi could safely have been navigated, it is perfectly clear that a pilot would believe that the depths given for the "Torresdale Range" referred to that channel. The trial court's finding that a range is not necessarily marked was clearly erroneous. A "range" in the navigational sense is defined as "a pair of lights or day-beacons used to mark a line of definite bearing." J. Hoel, *Naval Terms Dictionary,* (2nd ed. 1966). Similarly a "range" is "a direction indicated by two objects in line, as leading lights of a channel." W. A. McEwen and A. H. Lewis, *Encyclopedia of Nautical Knowledge* (1953). The Corps of Engineers itself has prepared a *Glossary of Mapping,*

6. The chart referred to, Exhibit L-7, was used to illustrate the coast geodetic chart in use at the time of the accident. Actually, it was issued on May 25, 1963, which was two days after the grounding. Apparently, the original exhibits were lost, and L-7 was agreed to be a fair representation of the chart which the pilot had with him on the day of the accident. This exhibit, showing depths supplied by the Corps of Engineers for the Torresdale Range, presents the same interpretive problem involved in the May 23, 1963 Corps of Engineers' chart described above.

7. See Discussion, 305 F. Supp. 882, 892-93.

Charting and Geodetic Terms (2nd ed. 1969) in which a "range" is defined as "the well-defined lines or courses whose positions are known and are used in determining soundings in a hydrographic survey," and a "range signal" is "a buoy, rod, flag or other similar object used to mark and identify range points when taking soundings during a hydrographic survey." Every expert navigator agreed that unles the depths given for a "range" referred to the range as marked on the navigational chart, the information as to depths would be entirely useless for navigational purposes because the pilot would have no way of knowing precisely where the stated depths were to be found.

A close examination of the charts themselves supports the reasonableness of this interpretation. The data for the "Torresdale Range" consists of nine columns. The first shows the "date of survey" as of November 7, 1962. Only the next three columns are headed "PROJECT" giving the width (400'), length (1.39 miles) and depth (40') of the proposed channel. The remaining five columns give the "minimum depths in the channel entering from seaward" at various points in the range. There is no indication that these depths are in the "project" and all the professional navigators agreed there was nothing appearing on the depth statement to indicate that the depths given were for a channel other than the one marked with range marks and buoys. Hence, on the day of the grounding, the Gerwi's navigator, relying upon the accuracy of the charts and depth statements published by the United States Government did reasonably conclude that the minimum depth in the Torresdale Range would be 29 feet 9 inches. He would also reasonably believe that the Corps of Engineers were regularly surveying and maintaining that channel, particularly since it was the only marked channel for ocean-going vessels in this area of the river which is heavily trafficked by large ore vessels such as the Gerwi bringing ore to the

Fairless plant of the United States Steel Company. The evidence is clear, however, that the Corps of Engineers had virtually abandoned the marked channel so that no depth maintenance had been performed since 1955, and that it had not been surveyed since 1957, except where it overlapped with the "project."[8]

The Government's argument is that it never had a duty (statutory or otherwise) to survey or maintain the Torresdale Range even though it had marked it with range lights and buoys. We find the trial court's acceptance of this position to be clearly erroneous.

It is unnecessary for us to decide whether the Government had a statutory duty to maintain and survey the existing Torresdale Range. In *Indian Towing of United States*, 350 U. S. 61, 64 (1955), the Supreme Court observed, "It is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner.":

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.[9] 350 U. S. at 69.

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8. In October of 1962, the Tyne Ore grounded in the same general vicinity as the Gerwi incident. After this prior grounding, the Corps of Engineers sounded only this portion of the river, found a shoal formation, and removed it. The center line of the old channel was then swept to a depth of 27'.

9. On remand, judgment was entered in favor of the United States. The District Court found plaintiff to be contributorily negli-

In the present case, the Government had published precise surveyed depths for the existing Torresdale Range until January 23, 1957. Suddenly, with no change in chart format, figures were inserted giving the depths in the "project channel" which was started at that time. The chart dated November 12, 1957, and all charts thereafter, gave depths for the "Torresdale Range" which actually were measured in the unmarked, uncompleted project. The Government's "reason" for giving up maintenance and surveying operations in the marked channel was merely that a new channel was being dug. Certainly, no reasonable navigator would anticipate such irresponsibility on the part of the Government, and the abandonment of the existing channel with no notice to navigators was clearly negligent.

Finally, the trial court held that appellants had not proved that the actions of the United States, even if negligent, were the proximate cause of the grounding of the Gerwi if negligence was shown:

> Even assuming in *arguendo* that the government had assumed such a duty, libellants have not carried their burden of convincing us that the failure to survey at some given interval was the cause of the grounding of the Gerwi. It is uncertain when the shoal upon which the Gerwi grounded was formed. Moreover, we are unable to determine whether the shoal was man-made or natural: the formation could have been caused either by reformation of the river itself, by the dredging operation that was taking place nearby, or for some other reason of which we are not aware. Consequently, even if the Government had not surveyed the Torresdale 25′ channel, say, every year, we are not convinced

9. (Cont'd.)

gent, and that the Coast Guard had exercised reasonable care in discovering a light failure. *Indian Towing Company v. United States*, 182 F. Supp. 264 (E. D. La. 1959), *aff'd.* 276 F. 2d 300 (5th Cir.) *cert. denied*, 364 U. S. 820 (1960).

that this would have averted the unfortunate accident of the Gerwi. 305 F. Supp. at 891.

The trial court's finding that the plaintiffs have not proved that the obstruction was one which the Government, by the exercise of reasonable care, could have discovered and removed might be dispositive of the case if the only ground for the plaintiffs' action was the Government's negligence in failing to survey and maintain the existing channel. However, the Government's negligence here is considerably more than a mere failure to exercise reasonable care. The principal negligent act was the publishing of false and misleading information which was calculated to induce reliance and did in fact induce reliance on the part of the navigator of this vessel. Under these circumstances, the plaintiffs satisfied their burden merely by showing that the information was wrong and that as a result of relying on this wrong information the damage occurred.[10]

Our conclusion, therefore, is that the appellants have proven that the negligence of the United States Government was the legal cause of the grounding of the Gerwi. There is no dispute that the extent of the monetary damage to the vessel was $201,378.67. Accordingly, the judgment of the District Court will be reversed and the case remanded to that court with instructions to enter judgment in the above amount in favor of appellants, together with such interest, if any, as the District Court may find to be due.

VAN DUSEN, *Circuit Judge,* dissenting.

I respectfully dissent and would affirm the district court judgment of September 8, 1969.

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10. This principle has been enunciated in the *Restatement (Second) of Torts* § 311 (1965) as follows: "One who negligently gives false information to another is subject to liability for phsyical harm caused by action taken by the other in reasonable reliance upon such information where harm results to the other . . ."

The standard of skill and knowledge required of a pilot is such that pilot Lappe must be held to have known the approximate depth of the channel he was navigating and he may not be permitted to rely on two ambiguous governmental documents to relieve him of that duty.

The standard of "skill and knowledge required of a pilot in charge of a vessel on the rivers" was first set forth in *Atlee v. Packet Company*, 88 U. S. (21 Wall.) 389, 396 (1874), a case cited throughout the years by numerous courts, including the Third Circuit. In that case, the Supreme Court stated:

> ". . . [T]he pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. . . . He must know where the navigable channel is . . . He must also be familiar with all dangers that are permanently located in the course of the river. . . . All this he must know and remember and avoid. . . .
>
> "It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high." *Id.*

In commenting on this standard, Judge Aldrich stated that "this salutary principle has not diminished simply because better charts may be available today than they were 75 years ago. On the contrary, a pilot is still expected to have local knowledge, and he is not doing his duty if he relies merely on outward appearances and on government charts available to anyone." *Essex County Electric*

Company v. Motor Ship Godafoss, 129 F. Supp. 657, 660 (D. Mass. 1955). This circuit has more recently stated that ". . . [t]he law imposes a duty upon him [the pilot] . . . to be 'constantly informed of changes in the current of the river' and the 'changes made by the hand of man or the action of the elements in the path of his vessel.' Davidson Steamship Co. v. United States, 1907, 205 U. S. 187, 194. . . . Where the river pilot has the means of obtaining information concerning these changes, he is deemed in law to know them." *Utility Service Corp. v. Hillman Transportation Co.*, 244 F. 2d 121, 124 (3d Cir. 1957). *See The Severance*, 152 F. 2d 916, 920 (4th Cir. 1945); *Continental Oil Co. v. M. S. Glenville*, 210 F. Supp. 865, 870 (S. D. Texas 1962).

Pilot Lappe had first class pilotage licenses issued by the United States Coast Guard and the State of Pennsylvania to pilot vessels from the Delaware Bay to Trenton on the Delaware River (77a-78a). He had piloted vessels on the Delaware River since 1953. It would appear that the standard of skill and knowledge required of a pilot is sufficiently strict to charge pilot Lappe with knowing that the old channel through which he was guiding the ship was 25 feet deep and, therefore, to hold him accountable regardless of any circumstances surrounding the coast geodetic chart (L-7) and the channel depth statement of May 3, 1963 (L-9), which he had with him.[1] In any event, the evidence

1. The findings of the trial judge which were not clearly erroneous included these:

"28. The fact that the new or 40′ channel and the old or 25′ channel on Torresdale Range were not coincident was common knowledge among shipping and navigation interests concerned with the upper Delaware River (N. T. 459-60).

29. Pilot Lappe did not have nor did he inspect at the Pilots Association the Survey Sheet of November 7, 1962, prepared by the Corps of Engineers (R-I) on which it clearly appears that the old (25′) and the new (40′), Torresdale Range are separate and do not coincide. (N. T. 165). Pilot Lappe, how-

shows that the district court was justified in finding that the government publications received in evidence were not the cause of the vessel's grounding. See *Kommanvittselskapet Harwi (Rolf Wigand) v. United States*, 305 F. Supp. 882, 890-4 (E. D. Pa. 1969).[2] The findings and conclusions of the district court concerning the pilot are not

1. (Cont'd.)

ever, knew prior to May 23, 1963, that there was an old channel and a new project channel in the Torresdale Range area and that these channels were not coincident, and he did not need the survey sheet of November 7, 1962 (R-I) to apprise him of this fact. (N. T. 165).

* * *

On May 10, 1963, Captain Powell of Norton, Lilly met with the Pilots Association on increasing the draft to 28 feet. . . .

* * *

32. The first 28′ draft ship which sailed from Philadelphia to Morrisville was the ORE VENUS on May 12, 1963—28′; followed by the GALASSIA on May 13, 1963—28′; third the RIO ORINOCO on May 18, 1963—28′; fourth the EDERA on May 21, 1963—28′. The GERWI was the fifth 28′ ship (Powell Deposition 56).

33. Pilot Lappe had taken both the RIO ORINOCO on May 18 and the EDERA on May 21 up the Torresdale Range. (N. T. 137-8)."

305 F. Supp. 882, 887.

The grounding in this case occurred when the pilot Lappe was forced to the side of the channel in order to avoid the dredging boat. A pilot who is beginning to take deeper draft vessels into a channel which has been used for vessels with lesser drafts would be under a stronger duty to check depths. Lappe appears to have relied on his prior center channel trips up the Torresdale Range and the reports of the other pilots who had taken 28′ draft vessels up the river that they had experienced no difficulty.

2. The district court said:

"[T]he libellants have not carried their burden of convincing us that the failure to survey at some given interval was the cause of the grounding of the GERWI. . . . [E]ven if the government had surveyed the Torresdale 25′ channel, say, every year, we are not convinced that this would have averted the unfortunate accident of the GERWI."

305 F. Supp. at 891.

"clearly erroneous" in my view. See, *e.g.*, 305 F. Supp. at 893-94.

Pilot Lappe knew there were two channels, an old one and a new project, and that they were not coincident (N. T. 165; 142a). He also admitted that he knew the new channel was not marked by working range lights and was not in operation (117-18a, 138a, 122a). He testified that he had received and was familiar with the Corps of Engineers' channel depth statements of January 23, 1957 (L-14, 385a, N. T. 105-08) and of November 12, 1957 (L-15, 386a, N. T. 108), which show the range lighted (old) channel as a 25-foot deep channel. Nevertheless, he read and understood the depths shown in the Engineers' channel depth statement of May 3, 1963 (L-9), as referring to the old or 25-foot channel still marked by range lights and buoys (finding of fact No. 27, 305 F. Supp. 882, 887).

Given the facts, the district judge was justified in concluding that the following confusing points of the documents should have led Lappe to question his interpretation of the coast geodetic chart (L-7) and the May 3, 1963, statement (L-9) and seek further clarification:

> 1. The depths for Torresdale Range in the two 1957 Corps of Engineers' statements (L-14, L-15), with which Lappe testified he was familiar, are considerably less (22.8-25.5 feet) than the depths in the May 3, 1963, statement (29.9-37.2 feet) or the coast geodetic chart (28.1-37.0 feet). This discrepancy in depths should have alerted Lappe to the distinct possibility that the figures on the May 3, 1963, statement and the coast geodetic chart referred not to the old channel but to the project channel. Lappe knew that the project channel was to be a 40-foot channel and that the portion of the channel in the Torresdale Range had not been completed at the time of the

grounding.[3] This knowledge, combined with his awareness that the two channels were not conterminous at the point of grounding, should have led him to question the increased depth of the range lighted channel which he felt the May 3, 1963, statement indicated contrary to the earlier depth statements (L-14, L-15). The only other explanation for the differences in depth figures is that the old channel was being dredged at the same time the new channel was being dug. In fact, Lappe testified that he was under the impression the old channel was being dredged (N. T. 105, 115). However reasonable it may have been for Lappe to assume that some work was continuing on the old channel while the new channel was under construction, he did know that the two channels were not coterminous and it was, therefore, unreasonable for him to assume that the depth of the old channel had been increased as much as 10 to 12 feet while a new channel was being dug. Therefore, at the least, he should have had doubts that the measurements on the May 3, 1963, statement and the coast geodetic chart referred to the new channel and checked further.

2. Under the column heading "Name of Channel Range" in the May 3, 1963, chart, Torresdale appears as "Torresdale (B) (C)." Note C after "Torresdale" in that statement indicates that "dredging to 40 ft. [is] in progress." The only logical explanation for the presence of this note in light of Lappe's apparent belief that the depths on the statement referred to the

3. "Q Do you know that the dredging work in Torresdale's 40 foot project was not yet completed as of the time the 'GERWI' went up?

"A Absolutely, because that is why the drill boat and the dredge were working there. Furthermore, there were no notices to instruct me any differently." (111-12a)

old channel is that the old channel was being dredged to 40 feet at the same time the new channel was being constructed. It seems unreasonable for Lappe to believe that this kind of simultaneous dredging was occurring.

3. A third factor which should have alerted Lappe was the absence of note "(A)" from "Torresdale (B) (C)" in the May 3, 1963, statement. Note "(A)" is defined at the bottom of the statement as meaning "Old Channel." It seems clear that a reasonable explanation for the absence of note "(A)" after "Torresdale" is that the two channels are not coincident at this point and the figures on the statement refer to the new, not the old, channel. At the least, Lappe should have questioned his belief that the last five columns of the statement referred to the old channel and have checked further. Lappe's own explanation is that he paid no attention to the absence of note "(A)" because it should have been placed after other channel names and was not (116a). However, knowledge that the statement contained erroneous data[4] certainly should have spurred him on to look at other maps or statements in order to seek clarification.

4. A fourth factor which should have alerted Lappe is the absence of footnote "b" from "Torresdale Range" in the coast geodetic chart (L-7). That footnote states "Controlling depths are for the channel as charted." The absence of this footnote seems to mean that the figures given on the statement in L-7 are *not* controlling depths for the channel as charted. Lappe testified that the map in L-7 was a map of the old channel (N. T. 119). Thus Lappe, because footnote

4. Lappe also testified that he was aware of other errors in the statement (122-124a).

"b" was missing, should have been alerted to the fact that the figures given in the statement were not figures referring to the old channel.[5]

If, as a reasonable man would have, Lappe had gone to other sources such as the map (Exhibit R-1) which he was advised to purchase by a note at the bottom of the May 3 statement, he would have discovered the true depths of the two channels (see Exhibit R-1).[6]

Under all the circumstances, the best that can be said for Lappe's position is that he should have consulted other maps and charts because of the ambiguity of the depth statements on which he relied.

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5. At N. T. 164, Lappe indicates that he may, in fact, have considered the statement of May 3, 1963, to refer to the project. At N. T. 164, Lappe states that the reason he did not purchase a depth-channel map, pursuant to the note at the bottom of the statement that "Maps showing the depths of channel are sold to the public at the cost of reproduction. Requests for such maps, including the locality desired, should be made to the District Engineer," which he had read, was because "I don't navigate ships in projects" (N. T. 164). It was hard to understand how Lappe could have made such a statement unless he thought that the whole of the May 3, 1963, statement referred to the new project and, therefore, that the maps referred to in the note also referred to the new project exclusively.

6. At N. T. 165-66, pilot Lappe admitted that if the map R-1 had been in his possession he would have "questioned [his interpretation of L-7 and L-9] immediately. There would have been great question in [his mind]. . . ."

OPINION OF THE COURT OF APPEALS ON RESUBMISSION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18301, 18302

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND) OWNER OF THE MOTOR VESSEL GERWI,
Appellant in No. 18,301

and

BERGENS SKIBSASSURANSEFORENING,
Appellant in No. 18,302

v.

THE UNITED STATES OF AMERICA,
Appellee

(D. C. Admiralty No. 39 of 1964)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 15, 1971

Resubmitted under 3rd Cir. Rule 12(6) on July 20, 1972, as a result of Orders of 2/24/72 and 7/7/72

Before SEITZ, *Chief Judge*, VAN DUSEN, *Circuit Judge*, and MASTERSON, *District Judge*

Opinion of the Court

(Filed September 26, 1972)

VAN DUSEN, *Circuit Judge.*

Kommanvittselskapet Harwi (Rolf Wigand), a Belgian corporation owning the Norwegian vessel Gerwi, brought suit against the United States under Section 742 of the Suits in Admiralty Act (46 U. S. C. § 742),[1] alleging that the Government was liable to it for damages which the vessel incurred when it grounded on rocks while it was proceeding up the Delaware River in the channel known as the Torresdale Range on May 23, 1963.

Plaintiffs contend that the negligence of the Government consisted of publishing misleading channel depth statements which bore no relation to the actual depths appearing on the Torresdale Range as marked on the navigational chart, in failing to survey and maintain the existing Torresdale Range to the depths indicated on the depth statement, and with failing to mark and thereby make navigable the new channel for which it was publishing depth statements.

After a lengthy trial, the district court found the United States not liable under any of these theories.[2] The trial court held that the United States had no statutory or assumed duty to survey or dredge the existing channel on a regular basis, and that the United States was not negligent in failing to notify the users of the waterway that the existing channel, as marked by range lights and buoys, was no longer being surveyed or maintained. Furthermore, it was held that the Government did not make any negli-

1. Bergens Skibsassuranseforening of Bergen, Norway, a Norwegian underwriter, was the hull underwriter on May 23, 1963, and was added as libellant in this action.

2. The district court decision is reported at 305 F. Supp. 882 (1969).

gent representations in the May 3, 1963, channel depth statement. The court added that even assuming negligence on either theory, it was not satisfied that plaintiffs had proved that the grounding of the Gerwi was caused by such negligence. Finally, the court held that the United States was not negligent in failing to mark the "project" channel.

At the time of the grounding, the Gerwi drew 27 feet 11 inches of water. As the vessel approached the Torresdale Range, the pilot saw a Corps of Engineers dredge flotilla on the edge of the range, and attempted to establish radio contact with it. The Coast Guard vessel Zinnia responded to the Gerwi's call to the dredge flotilla and advised the pilot to pass the flotilla on the Pennsylvania (left of center) side of the channel.

The pilot entered the Torresdale Range and aligned the Gerwi's extreme starboard side with the range lights marking the center of the range. As the Gerwi drew abeam of the drill boat accompanying the dredge, she struck rocks which pierced her 1, 2 and 3 port double bottom tanks resulting in the damages for which claim was brought in the district court.

Pilot Lappe had first class pilotage licenses issued by the United States Coast Guard and the State of Pennsylvania to pilot vessels from the Delaware Bay to Trenton on the Delaware River (77a-78a). He had piloted vessels on the Delaware River since 1953. The findings of the trial judge which are supported by evidence and are not clearly erroneous include these:

> "28. The fact that the new or 40′ channel and the old or 25′ channel on Torresdale Range were not coincident was common knowledge among shipping and navigation interests concerned with the upper Delaware River (N. T. 459-60).
>
> "29. Pilot Lappe did not have nor did he inspect at Pilots Association the Survey Sheet of November 7,

1962, prepared by the Corps of Engineers (R-I) on which it clearly appears that the old (25′) and the new (40′) Torresdale Range are separate and do not coincide. (N. T. 165). Pilot Lappe, however, knew prior to May 23, 1963, that there was an old channel and a new project channel in the Torresdale Range area and that these channels were not coincident, and he did not need the survey sheet of November 7, 1962 (R-I) to apprise him of this fact. (N. T. 165).

* * *

On May 10, 1963, Captain Powell of Norton, Lilly met with the Pilots Association on increasing the draft to 28 feet. . . .

* * *

"32. The first 28′ draft ship which sailed from Philadelphia to Morrisville was the ORE VENUS on May 12, 1963—28′; followed by the GALASSIA on May 13, 1963—28′; third the RIO ORINOCO on May 18, 1963—28′; fourth the EDERA on May 21, 1963—28′. The GERWI was the fifth 28′ ship (Powell Deposition 56).

"33. Pilot Lappe had taken both the RIO ORINOCO on May 18 and the EDERA on May 21 up the Torresdale Range (N. T. 137-8)."

305 F. Supp. 882, 887.

The grounding in this case occurred when the pilot Lappe steered the Gerwi to the side of the channel in order to avoid the dredging boat. A pilot who is beginning to take deeper draft vessels into a channel which has been used for vessels with lesser drafts would be under a stronger duty to check depths.[3] Lappe appears to have relied on

3. The standard of "skill and knowledge required of a pilot in charge of a vessel on the rivers" was first set forth in *Atlee v. Packet Company*, 88 U. S. (21 Wall.) 389, 396 (1874), a case cited throughout the years by numerous courts, including the Third Circuit. In that case, the Supreme Court stated:

his prior center channel trips up the Torresdale Range and the reports of the other pilots who had taken 28′ draft vessels up the river that they had experienced no difficulty. At 157a, Lappe testified:

> "But the fact that there were three ships prior to this, I had no reason to think that the 'Gerwi' couldn't pass at 28 feet."

(There were actually four such ships that had preceded the Gerwi going north on the Delaware River—see finding 32 quoted at page 4 above.)

The evidence shows that the district court was justified in finding that the Government publications received in evidence were not the cause of the vessel's grounding.[4]

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3. (Cont'd.)

". . . [T]he pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. . . . He must know where the navigable channel is. . . . He must also be familiar with all dangers that are permanently located in the course of the river. . . . All this he must know and remember and avoid. . . ."

In commenting on this standard, Judge Aldrich has stated that "this salutary principle has not diminished simply because better charts may be available today than they were 75 years ago. On the contrary, a pilot is still expected to have local knowledge, and he is not doing his duty if he relies merely on outward appearances and on government charts available to anyone." *Essex County Electric Company v. Motor Ship Godafoss*, 129 F. Supp. 657, 660 (D. Mass. 1955). This circuit has more recently stated that ". . . [t]he law imposes a duty upon him [the pilot] . . . to be 'constantly informed of changes in the current of the river' and the 'changes made by the hand of man or the action of the elements in the path of his vessel.' Davidson Steamship Co. v. United States, 1907, 205 U. S. 187, 194. . . . Where the river pilot has the means of obtaining information concerning these changes, he is deemed in law to know them." *Utility Service Corp. v. Hillman Transportation Co.*, 244 F. 2d 121, 124 (3d Cir. 1957). *See The Severance*, 152 F. 2d 916, 920 (4th Cir. 1945); *Continental Oil Co. v. M. S. Glenville*, 210 F. Supp. 865, 870 (S. D. Texas 1962).

4. It is only where negligently given false information causes harm that liability results. See Restatement (2d) of Torts, § 311 (1965).

See *Kommanvittselskapet Harwi (Rolf Wigand) v. United States*, 305 F. Supp. 882, 890-94 (E. D. Pa. 1969). For this reason, we need not decide whether the Government published inaccurate and misleading information concerning depths in the Torresdale Range in Exhibit L-9[5] (U. S. Army Engineers Statement, showing PROJECT Depth of 40 Feet for Torresdale Range and minimum depth as of May 3, 1963 of 29.9 feet in such Range).

The district court found that, "even assuming that the May 3 statement (Exhibit L-9) was misleading and that publication of it was negligent under the circumstances, the plaintiff has not carried his burden of convincing us that the GERWI, its crew and pilot, relied on the accuracy of this statement and that such reliance was a cause in fact of its grounding."[6] This finding is amply supported by the record and, therefore, not clearly erroneous.

We note that depths in the Keystone Range, as shown on L-9, were all 23.8 feet or less, so that Lappe could not have been relying on that May 3, 1963, statement as an accurate statement of depths in all those portions of the river

5. Reproduced at 305 F. Supp. 886. As to the duty of the Government to use due care in the preparation of charts and notices, see *DeBardeleben Marine Corp. v. United States*, 451 F. 2d 140, 149 (5th Cir. 1971). Given this record, the trial judge was justified in concluding that Lappe should have questioned his interpretation of the coast geodetic chart (L-7) and the May 3, 1963, statement (L-9) and sought further clarification. See 305 F. Supp. at 893-94. If Lappe had gone to other sources such as the map (Exhibit R-1) which he was advised to purchase by a note at the bottom of the May 3 statement (Exhibit L-9), he would have discovered the true depths of the two channels. At N. T. 165-66, pilot Lappe admitted that if Exhibit R-1 had been in his possession he would have "questioned [his interpretation of L-7 and L-9] immediately. There would have been great question in [his mind]. . . ."

6. Similarly, the district court stated: "In short, we do not think that the publication of the depth statement of May 3, 1963, was the cause of the GERWI's grounding" (893 of 305 F. Supp.).

to be traversed by his vessel drawing 27 feet 11 inches. This evidence, the testimony quoted above at page 5, and the statement by the trial judge that he was "dubious" of an assertion by Lappe concerning L-9 (894 of 305 F. Supp.) are among the items supporting the above-quoted statement of the district court. This court is not "left with the definite and firm conviction that a mistake has been committed." See *McAllister v. United States*, 348 U. S. 19, 20 (1954).

We have given careful consideration to the other contentions of libellants and find they are without merit.

The judgment of the district court will be affirmed.

Judge Masterson dissents for the reasons stated in the per curiam opinion joined in by a majority of the panel, filed on September 29, 1971, and vacated by order of February 24, 1972, which is annexed as an exhibit* to this opinion.

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* Exhibit omitted. The Per Curiam opinion filed September 29, 1971 is printed *supra*, at pp. A25-A33.

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,301 & 18,302

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND) OWNER OF THE MOTOR VESSEL GERWI,
Appellant in No. 18,301

and

BERGENS SKIBSASSURANSEFORENING,
Appellant in No. 18,302

v.

THE UNITED STATES OF AMERICA

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges*, and MASTERSON, *District Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ FRANCIS L. VAN DUSEN,
Judge.

Dated: November 2, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1050

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners commenced this action in the United States District Court for the Eastern District of Pennsylvania under the Suits in Admiralty Act (46 U.S.C. 742). They alleged that the United States was liable for damages of approximately $200,000.00 to the hull of the vessel Gerwi, incurred when the Gerwi struck some rocks in a channel (the "Torresdale Range") of the Delaware River while passing a dredge and drill flotilla at work in the area of the grounding. Following a lengthy trial, the district court held that the United States was not liable under any of the theories urged by petitioners (Pet. App. A1-A24). A divided court of appeals initially reversed (Pet. App. A25-A40). On rehearing, the judgment of the district court was affirmed (Pet. App. A41-A47), one judge dissenting.

The material facts can be briefly stated. On May 23, 1963, the vessel Gerwi, drawing almost 28 feet of water, left Philadelphia and headed up the Delaware River to Morrisville, Pennsylvania. It was only the fifth ship that size ever to make the trip (Pet. App. A9).[1] As the Gerwi entered that part of the river known as the Torresdale Range, it encountered a dredge and drill flotilla working in the area. The flotilla was dredging a new 40-foot "project" channel at a point where the "project" partially overlapped the existing 25-foot channel (Tr. 42-43).

The pilot of the Gerwi, Lappe, maneuvered the ship to the left half of the 25-foot channel to pass the dredging equipment (Pet. App. A4); as the Gerwi came abeam the drill boat, it struck rocks, causing some leakage (Tr. 197). The pilot was able to trim the vessel close to an even keel and complete the voyage to Morrisville without further incident (*ibid.*).

Petitioners argue here, as they did below, that the government was responsible for the grounding because the channel depth statement it issued on May 3, 1963, was so negligently drawn as to be misleading. That channel statement, which is reproduced at Pet. App. A7, accurately reported, *inter alia*, the depths in the 40-foot "project" channel then under construction in the Torresdale Range. Petitioners contend that the reported depths could have been misread as pertaining to the shallower 25-foot channel, thereby causing Pilot Lappe to sail the Gerwi through the smaller channel on the mistaken

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[1] The Pilots Association decided for the first time on May 10, 1963, to try to take vessels with a draft of 28 feet upriver. The four vessels that size preceding the Gerwi made the trip on May 12, 13, 18 and 21, respectively (Pet. App. A8-A9).

assumption that it could accommodate a vessel drawing 28 feet of water.

Even assuming *arguendo* that the channel statement could be so misinterpreted,[2] both courts below determined that the record showed that Pilot Lappe and his crew had not relied on the accuracy of this statement in taking the Gerwi upriver, and thus it was not a cause of the grounding (Pet. App. A46).[3] As indicated in the memorandum opinion of the district court (Pet. App. A20-A22), the separate opinion of Judge Van Dusen, dissenting, when the case was initially decided by the court of appeals (Pet. App. A33-A40), and the majority opinion of the court of appeals on rehearing (Pet. App. A41-A47), that finding

---

[2] The district court found that the May 3 channel statement was unambiguous and clearly "referred to the 40 [foot] project range" (Pet. App. A21). That finding was not disturbed by the court of appeals.

[3] This case is thus unlike *Afran Transport Co.* v. *United States*, 435 F. 2d 213 (C.A. 2), certiorari denied, 404 U.S. 872, cited by petitioners. That case involved the separate question whether another vessel involved in a shipping accident was contributorily at fault. The issue of contributory fault is not in this case. Nor does this case concern the various exceptions to liability contained in the Federal Tort Claims Act, that were at issue in another case cited by petitioners, *Somerset Seafood Company* v. *United States*, 193 F. 2d 631 (C.A. 4). The case at bar was instituted under the Suits in Admiralty Act.

is amply supported by the evidence.[4] There is thus no warrant for further review.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[4] If Pilot Lappe had indeed relied on the May 3 channel statement as reporting depths in the 25-foot channel rather than in the 40-foot "project" channel, he never would have left Philadelphia. The Gerwi had to pass not only through the Torresdale Range on its way to Morrisville, but also through, among others, Keystone Range, Landreth Range, Newbold Range and Whitehill Range, all of which had less than 28 feet of water according to the May 3 statement (Pet. App. A7). Thus, as the court of appeals pointed out (Pet. App. A46-A47), Pilot Lappe "could not have been relying on that May 3, 1963, statement as an accurate statement of depths in all those portions of the river to be traversed by his vessel drawing 27 feet 11 inches."

[5] Petitioner's reliance on *Indian Towing Company* v. *United States*, 350 U.S. 61, is misplaced. The court below did not hold, as petitioners suggest (Pet. 10), that the United States need not use due care in publishing its channel statements. Compare *Indian Towing Company, supra*, 350 U.S. at 69. Rather, it found it unnecessary to consider whether the May 3 statement had been negligently drawn (Pet. App. A46), since, on this record, it was clear that "the Government publications received in evidence" had not been relied on by the pilot or crew of the Gerwi, and thus "were not the cause of the vessel's grounding" (Pet. App. A45).

Petitioner also relies on two early decisions of this Court dealing with the question of the vicarious liability of the ship owner due to the negligence of the vessel's pilot. See *The China*, 7 Wall 53, and *Homer Ramsdell Transportation Co.* v. *La Compagnie Generale Transatlantique*, 182 U.S. 406. Those cases are, however, inapposite in the present context; the issue of the ship owner's liability for the Gerwi grounding has never been litigated.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973.

No. .

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND)
Owner of the Motor Vessel GERWI
and
BERGENSSKIBSASSURANSEFORENING,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

RICHARD W. PALMER,
RAWLE & HENDERSON,
2100 Packard Building,
Philadelphia, Pa. 19102,
Counsel for Petitioners.

RAUL BETANCOURT, JR.,
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

REPLY BRIEF FOR PETITIONERS.

The Memorandum of the United States in Opposition contains significant inaccuracies.

Footnote 4 on page 4 is factually incorrect in the respects noted below.

Footnote 4 states in part:

> "The GERWI had to pass not only through the Torresdale Range on its way to Morrisville, but also through, among others, Keystone Range, Landreth Range, Newbold Range and Whitehill Range, all of which had less than 28 feet of water according to the May 3 statement (Pet. App. A7)."

The GERWI did not pass through the Newbold or Whitehill Ranges. These ranges are beyond the Fairless Terminal at Morrisville, which was the GERWI's destination. The entrance to the Fairless Terminal is at the Junction of Penn Channel and Newbold Range. It is therefore incorrect to state that the GERWI passed through Newbold Range or Whitehill Range.

As to Landreth Range ("Project") the May 3 channel depth statement reports depths in excess of 36.3 feet which were sufficient for the GERWI.*

The "old" or existing Landreth Channel labeled "(A)" on the May 3 statement also had sufficient depths for the GERWI in the middle half of the channel to the right channel edge. The depth statement reports a minimum depth of 26.3 feet. With a plus 4 foot flood tide the vessel was proceeding in a minimum depth of 30.3 feet. These depths were proved adequate for the GERWI, drawing 27 feet 11 inches (F/F No. 6 Pet. App. A3).

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* Any depth shown on the May 3 statement is the minimum at mean low water to which the four foot flood tide then prevailing must be added for the time of the transit of the GERWI (F/F 9 Pet. App. A3).

It cannot be presumed that the GERWI pilot would navigate on his own left outside quarter where insufficient water was shown on the May 3 statement.

The government's inappropriate comments as to the existing depths in Keystone Range (a short range) are answered on pages 17-18 of the Petition.

No proof as to the Keystone Range was offered by the Government at the trial. It was not proved that the pilot relied on the May 3 statement for Keystone depths. The proof at the trial related to his reliance as to the depths in Torresdale where the vessel grounded.

Any consideration of Keystone inferred by the Circuit Court is outside the record. It was common knowledge that the Keystone depths shown in the statement had been greatly increased as a result of dredging and that the Keystone "project" channel had to be used for navigation since its center line was coincident with that of the "existing" range.

It was improper for the Circuit Court on consideration of the Government's Petition for Rehearing to conclude without any evidence below that the depths shown on the May 3 statement for Keystone indicate that the pilot "never would have left Philadelphia had he been relying on the May 3 statement". This is a conclusion unsupported by the record.

In any event it has never been argued before in this case that reliance to be effective requires reliance on every feature of the May 3 statement.

Obviously, the requirement for reliance as to liability is met if any feature of the document is relied upon to the damage of the vessel.

The pilot's testimony contains uncontracted evidence substantiating his reliance on L-9, the May 3 Channel Depth Statement for Torresdale Range (Lappe 106a, 107a, 110a, 113a, 138-139a).

The Court by its own specific questions during the pilot's testimony fully revealed its understanding that the pilot relied on the May 3 statement, among other basic sources of information.

During our interrogation about another document (a Local Notice to Mariners) the Court, in fact, insisted that the witness was relying on L-9 and not the document about which he was being questioned.

> "Q. Now, we are looking at a notice which is dated January 12, 1963, containing depths from an Army survey dated December 4, 1962, and this is dated prior to the grounding of the "Gerwi" on May 23, 1963, so did you have this depth information in the form of the Local Notices to Mariners prior to the grounding?
>
> A. I had this one (indicates), yes, sir, right here.
>
> MR. MCGOVERN: Your Honor, may we identify——
>
> THE COURT: Now, I am not going to put up with this much longer. The witness has told you, he has waived that—I think it is Exhibit No. 7, or is it 9? [L-9]
>
> MR. PALMER: He told me he got a local notice.
>
> THE COURT: Well, he told the Court that he had that, and that is what he relied on.
>
> Now, don't ask me to find when this case is concluded that he relied on something which he says he didn't. He has waived that paper [L-9] two or three times and showed it to you standing there and said, 'This is what I had. This other thing comes out later. This is what I had. This is what I relied on.'" (130-131a)

At pages 121-122 (Original Testimony) the Trial Court again confirmed the unequivocal testimony of the pilot that he relied on L-9, the May 3 Channel Depth (Appendix to Reply Brief, pages 5-6, *infra*).

The second split decision of the Third Circuit (A41-47), by ignoring the uncontradicted and overwhelming weight of the evidence of the pilot's reliance on the May 3 statement, has necessarily compelled the Government to resort to the illusory arguments about Keystone, Landreth, Newbold, and Whitehill Ranges, not supported by a scintilla of evidence in the record of the case.

Judge Masterson in the first split decision for the Third Circuit (A26-33), reversing the Trial Court and holding the United States liable, clearly perceived the justice and national importance of confirming the responsibility of the United States for negligent publication of navigation information distributed for the specific purpose of inducing reliance by navigators.

Respectfully submitted,

RICHARD W. PALMER,
RAWLE & HENDERSON,
Attorney for Petitioners.

RAUL BETANCOURT,
Of Counsel.

APPENDIX TO REPLY BRIEF.

[Original Testimony Page 121.]

* * *

Mr. Palmer: If Your Honor please, before I go into some other matters that Mr. McGovern and I are mutually interested in, I would like to clarify one thing.

By Mr. Palmer:

Q. Look at L-9, the May 3 channel statement, 1963, all right?

Now, tell me what channel those depths for Torresdale Range relate to you as a navigator.

A. They relate to the channel with the range lights.

Q. The columns you are referring to are which ones?

A. I am referring to the columns on the extreme right, five columns.

Q. The five columns under what heading?

A. "Minimum depth in channel entering from seaward."

The Court: Mr. Palmer, I hate to interrupt you,

[Original Testimony Page 122—App. Page 139a.]

but we have been all over this. I am fully aware that he said he had this thing and he relied on the 29.9. He gave 4 more feet for the tide. We went into all that in detail.

Mr. Palmer: I think it is now clear, Your Honor. I was afraid that it had been misunderstood this morning, but I see that it is very clear.

The Court: It is perfectly clear to me.

Mr. Palmer: Thank you, Your Honor.

I will proceed now to cover——

The Court: I am not saying that that is a fact, but that is the witness's testimony.

Mr. Palmer: Yes, Your Honor.

The Court: He went into it in great detail.

• • •